Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1665

JERSEY CENTRAL POWER & LIGHT COMPANY,
*Petitioner*

v.

FEDERAL ENERGY REGULATORY COMMISSION,
*Respondent*

ALLEGHENY ELECTRIC COOPERATIVE, INC.,
*Intervenor*

BOROUGHS OF MADISON, BUTLER, LAVALLETTE AND SEASIDE HEIGHTS, NEW JERSEY,
*Intervenors*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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May 3, 1979

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OCTOBER TERM, 1978

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**No.**

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JERSEY CENTRAL POWER & LIGHT COMPANY,
*Petitioner*

v.

FEDERAL ENERGY REGULATORY COMMISSION,
*Respondent*

ALLEGHENY ELECTRIC COOPERATIVE, INC.,
*Intervenor*

BOROUGHS OF MADISON, BUTLER, LAVALLETTE AND SEASIDE HEIGHTS, NEW JERSEY,
*Intervenors*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

The petitioner, Jersey Central Power & Light Company, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 8, 1979.

## OPINIONS BELOW

Neither the initial opinion of the Court of Appeals (App. A, pp. 1a-9a, *infra*) nor its opinion denying rehearing (App. B, p. 10a, *infra*) have been reported.

The Federal Energy Regulatory Commission and its predecessor, the Federal Power Commission, issued the following six orders:

(1) Order Accepting for Filing and Suspending Proposed Rate Increase, and Establishing Procedures, Docket No. ER76-813 (August 26, 1977) (App. C, pp. 11a-14a, *infra*);

(2) Order Granting Interventions, Denying Requests for Fuel Adjustment Clause and Denying Requests for Five-Month Suspension, Docket No. ER76-813 (September 20, 1976) (App. D, pp. 15a-18a, *infra*);

(3) Order Denying Rehearing, Docket No. ER76-813 (October 22, 1976) (App. E, pp. 19a-21a, *infra*);

(4) Order Granting Motion for Summary Disposition, Docket No. ER76-813 (October 25, 1977) (App. F, pp. 22a-26a, *infra*);

(5) Order Denying Rehearing, Docket No. ER76-813 (December 23, 1977) (App. G, pp. 27a-30a, *infra*); and

(6) Order Denying Stay, Docket No. ER76-813 (January 20, 1978) (App. H, pp. 31a-36a, *infra*).

None of these orders has been reported.



## JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on December 8, 1978. A timely petition for rehearing was denied on February 2, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and § 313(b) of the Federal Power Act, 16 U.S.C. § 825*l* (b).

## QUESTION PRESENTED

Whether, in view of its lack of authority to issue reparation orders, the Federal Energy Regulatory Commission has the power to approve a just and reasonable electric utility tariff provision which seeks to recover for monies spent to purchase fuel consumed in generating electricity, where the monies were spent *before* the tariff's effective date, but the fuel costs to be recovered are properly allocated as costs to billing months occurring *after* the tariff's effective date?

## STATUTORY PROVISIONS AND REGULATIONS INVOLVED

This case involves Sections 201(a), 205(a), 205(b), 205(c), 205(d), 205(e) and 313(b) of the Federal Power Act, 16 U.S.C. §§ 824(a), 824d(a), 824d(b) 824d(c), 824d(d), 824d(e) & 825*l*(b) (1976), and 28 U.S.C. § 1254(1) (1976). (App. J, pp. 43a-48a, *infra*). Also involved is Section 35.22(e)(3) of the Federal Energy Regulatory Commission's Rules, 18 C.F.R. § 35.22(e)(3). (App. K, pp. 49a-54a, *infra*).

## STATEMENT OF THE CASE

### A. *Background*

This case involves the legality of an electric utility tariff provision under which petitioner Jersey Central Power & Light Company ("Jersey Central") is attempting to obtain $631,834 from its wholesale customers in compensation for fuel consumed to provide them with electric service.[1] The provision at issue was contained in a tariff filed on July 27, 1976 with the Federal Power Commission ("FPC" or "Commission"),[2] and consisted of a phase-in mechanism under which the base fuel cost in Jersey Central's fuel cost adjustment clause would gradually increase from the level employed in the utility's superseded, December 2, 1973, tariff to a level corresponding to the energy charge employed throughout its new tariff.[3] By

[1] With the exception of the Borough of Pemberton, each of Jersey Central's wholesale customers intervened below. While Jersey Central supplies retail electric service to various parts of New Jersey under the terms of a tariff filed with Board of Public Utilities of the State of New Jersey, the rates charged these customers are not subject to direct federal regulation. *See* 16 U.S.C. § 824(a). The New Jersey Board of Public Utilities has authorized the recovery of deferred fuel costs which the FERC has denied. Phase I Order in *Jersey Central Power & Light Co.*, Docket Nos. 7610-1021 & 776-492, (N.J.B.P.U., Sept. 1, 1977).

[2] Pursuant to the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (Aug. 4, 1977), and Exec. Order No. 12,009, 3 C.F.R. § 142 (Supp. 1978), the FPC ceased to exist and its regulatory responsibilities were transferred to the newly created Federal Energy Regulatory Commission ("FERC" or "Commission"). Section 402(a)(1) of the Act transferred all proceedings pending before the FPC to the FERC. These agencies will be referred to interchangeably as the Commission.

[3] Like most electric utility tariffs, Jersey Central's tariffs assessed a demand charge to recover relatively fixed, capacity-related costs and an energy charge to recover variable costs of supplying electricity. Jersey Central's energy charge had two components: a predetermined

*(footnote continued)*



this means, petitioner sought to recover fuel costs which, under traditional accrual accounting principles, would not be recorded as expenses until after the effective date of the new tariff, even though the cash to purchase the fuel had been spent before that date.

### B. *Commission Proceedings*

By order dated August 26, 1976, the Commission accepted Jersey Central's new tariff for filing, suspended it for one month, and ordered a hearing to examine the lawfulness of the tariff. (App. C, pp. 11a-14a, *infra*). A second Commission order, issued September 20, 1976, permitted five Jersey Central customers to intervene, but denied their requests for summary rejection of the phase-in provision. (App. D, pp. 15a-18a, *infra*). As a result of these orders, the new tariff became effective subject to refund on September 27, 1976. (App. C, p. 12a, *infra*). An October 27, 1976 order denied the intervenors' application for rehearing of the September 20 order (App. E, pp. 19a-21a, *infra*), and the hearing contemplated in the August 26 order began. (R. 527). Jersey Central sought to prove in this hearing that all aspects of its new tariff were just and reasonable. (R. 534).

*(footnote continued)*

base charge for each kilowatt-hour of electricity consumed during the billing month and a fuel adjustment charge designed in conjunction with the base energy charge, to match revenues recovered with actual fuel costs. Under Jersey Central's fuel adjustment clauses, each customer's monthly bill was raised or lowered by the product of the number of kilowatt-hours of electricity used during the billing month and the difference between the average cost of all fuel Jersey Central consumed during the three-month period ending two months prior to the billing month and a preset base fuel cost. The instant dispute arose because petitioner's new tariff proposed to increase the base energy charge in one step, while phasing-in the corresponding increase in the base fuel cost over a period of five months.

Prior to any further action on Jersey Central's tariff, the Commission adopted Opinion No. 790, *Public Service Co. of New Hampshire,* 19 PUR 4th 210, *rehearing denied,* Opinion No. 790-A, Docket No. ER76-285 (May 20, 1977), *appeal docketed,* No. 77-1592, D.C. Cir., July 7, 1977. In that case, the Commission held that it lacked the power to sanction a surcharge designed to recover unbilled fuel costs arising from the adoption of a new fuel cost adjustment clause. The Commission found that Public Service Company of New Hampshire had intended the fuel clause in its old tariff to use prior fuel costs as an "estimate" or proxy for fuel costs actually incurred in the billing month. Because of this circumstance, the Commission reasoned, approval of the surcharge would violate the filed rate doctrine enunciated in *Montana-Dakota Utilities Service Co. v. Northwestern Public Service Co.,* 341 U.S. 246 (1951), and consequently would result in the type of retroactive rate increase proscribed under *FPC v. Hope Natural Gas Co.,* 320 U.S. 591 (1944). The Commission has uniformly applied this approach to a series of cases rejecting other fuel cost adjustment surcharge provisions.[4]

[4] *E.g.,* Order Modifying Initial Decision and Rejecting Proposed Fuel Adjustment Clause in *Maine Public Service Co.,* Docket No. E-8264 (FPC, June 27, 1977), *rev'd and remanded,* 579 F.2d 659 (1st Cir. 1978); Order Denying Proposed Fuel Adjustment Clause Surcharge in *Virginia Electric & Power Co.,* Docket No. ER 76-415 (FPC, June 20, 1977), *rehearing denied,* Docket No. ER 76-415 (FPC, Aug. 5, 1977), *aff'd,* 580 F.2d 710 (4th Cir. 1978) (per curiam); Order Accepting for Filing Proposed Rate Schedules, Granting Interventions, Approving Settlement Agreement, Granting Waiver of Commission's Regulations and Summarily Disposing of Proposed Surcharge Provision in *Appalachian Power Co.,* Docket No. ER77-325, (FPC, June 30, 1977), *rehearing denied,* Docket No. ER77-325, (FPC, Sept. 14, 1977), *appeal docketed,* Nos. 77-204 & 77-205, D.C. Cir., Nov. 11, 1977; Order Denying Proposed Fuel Adjustment Clause Surcharge in *Pennsylvania Electric Co.,* Docket No. ER76-607 (FERC, Dec. 19, 1977), *rehearing denied,* Docket No. ER76-607

*(footnote continued)*



In an October 25, 1977 decision, the Commission severed the issues raised by Jersey Central's phase-in provision from the other issues raised in connection with its new tariff and, without considering the evidence presented at the pending hearing, found the provision unlawful. (App. F, pp. 22a-26a, *infra*). The sole basis for this action was a conclusion that there were no material, factual or legal differences between petitioner's phase-in provision and the surcharge arrangements disapproved in *Public Service Co. of New Hampshire* and its progeny. (App. F, p. 25a, *infra*). The Commission did not reach the question whether Jersey Central's phase-in provision was just and reasonable within the meaning of Section 205(a) of the Federal Power Act, 16 U.S.C. § 824d(a) (1976).

Jersey Central sought rehearing, which was denied on December 23, 1977. (App. G, pp. 27a-30a, *infra*). A subsequent request for a stay was denied on January 20, 1978. (App. H, pp. 31a-36a, *infra*).

### C. *Decisions Below*

The United States Court of Appeals for the Third Circuit affirmed, solely on the basis of its construction of Jersey Central's 1973 fuel cost adjustment clause, which had been in effect prior to the clause at issue here. (App. A, pp. 1a-9a, *infra*). The court interpreted that prior

*(footnote continued)*

(FERC, Feb. 13, 1978), *appeal docketed,* D.C. Cir., No. 78-1329, (April 13, 1978); Order Denying Proposed Fuel Adjustment Clause Surcharging in *Metropolitan Edison Co.,* Docket Nos. ER 76-209 & ER 76-492 (FERC, Dec. 19, 1977), *rehearing denied,* Docket Nos. ER 76-209 & ER 76-492 (FERC, Feb. 13, 1978), *appeal docketed,* No. 78-1330, D.C. Cir., April 13, 1978. By orders issued April 13, 1978 and June 6, 1978, the United States Court of Appeals for the District of Columbia Circuit consolidated the appeals in *Appalachian Power, Pennsylvania Electric, Metropolitan Edison* and *Public Service.*

clause as intending the recovery of fuel costs "incurred" during the billing month rather than previously "incurred" expenses whose recognition had been deferred. Since this interpretation implied that there had been no billing lag under the 1973 tariff, the court held that petitioner's 1976 fuel adjustment clause could not properly employ a phase-in clause to recover uncollected fuel costs. (App. A, p. 3a, *infra*). The court did not explain its decision in terms of the Commission's enabling statute. Instead, the court merely found "that the Commission [was] on solid ground in concluding that a reasonable interpretation of the tariff compel[led] the result it reached." (App. A, p. 8a, *infra*).

Jersey Central petitioned for rehearing, requesting an explanation of why the Court's construction of the 1973 fuel adjustment clause required the rejection of the 1976 phase-in provision. (App. I, pp. 37a-42a, *infra*). On February 2, 1972, the Court denied this request without opinion. (App. B, p. 10a, *infra*).

## REASONS FOR GRANTING THE WRIT

### A. *The Result Reached Below Conflicts with the Decision of the United States Court of Appeals for the First Circuit as to the Scope of the Federal Energy Regulatory Commission's Power to Determine Whether Tariff Provisions Are Just and Reasonable.*

The court below recognized that its affirmance of the Commission's decision contradicted the holding of the United States Court of Appeals for the First Circuit in *Maine Public Service Co. v. FPC*, 579 F.2d 659 (1st Cir. 1978). In that case, the first circuit vacated a Commission order, which had declared unlawful a fuel cost adjustment



surcharge provision and which the Commission relied upon to reject Jersey Central's phase-in provision. (App. F, p. 24a, *infra*). The first circuit held that the Commission had erroneously concluded in *Public Service Co. of New Hampshire, supra,* that prior judicial precedent automatically precluded the validation of a surcharge provision that was neither impermissible for policy reasons nor inequitable. 579 F.2d at 668. Since the Commission had failed to analyze "a close issue of rate-making policy which Congress expected the Commission, not the courts, to resolve," *id.*, the first circuit remanded the case for proceedings on the question whether the surcharge provision was just and reasonable within the meaning of Section 205(a).

The third circuit based its rejection of the first circuit's analysis on its own reading of *Public Service Co. of New Hampshire, supra.* Where the first circuit viewed that case as relying upon an unduly expansive interpretation of *Montana-Dakota Utilities Company v. Northwestern Public Service Co., supra,* the third circuit thought the Commission's construction of the tariff dispositive. (App. A., p. 8a, *infra*).

The third circuit's view ignores the Commission's own explanation of its decisions. In its opinion rejecting the subject phase-in provision, the Commission stated:

> Our determinations in Public Service Company of New Hampshire and in the subsequent surcharge cases were based on the filed rate doctrine and on the Federal Power Act proscription of retroactive rate making. The factors set out there are equally applicable to this proceeding and we do not believe it is necessary for the

> hearing in this matter to consider Jersey Central's proposed phase-in. (footnote omitted)

(App. F, p. 25a, *infra*). Instead of reviewing this decisional basis, the third circuit relied exclusively on its construction of the 1973 tariff. The consequent rejection of the Commission's rationale acts to substitute judicial judgment for a deficient administrative judgment.[5] *See Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 763-64 (1973); *accord, SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943); *Public Media Center v. FCC*, No. 76-1648 (D.C. Cir., Oct. 24, 1978).

The court's construction, by itself, provides no legal basis for disapproving the phase-in provision of Jersey Central's tariff. Without such a basis, the third circuit's decision falls of its own weight. The court below declined to elaborate on the legal basis for its conclusion in response to Jersey Central's petition for rehearing. (App. B, p. 10a, *infra;* App. I, pp. 37a-42a, *infra*). By its holding, however, the court below necessarily upheld the Commission's determination that, because of its interpretation of the 1973 tariff, Jersey Central's phase-in provision constitutes a form of retroactive ratemaking which the Commission was powerless to approve, no matter how just and reasonable. It is this necessarily implied holding which is in direct conflict with the first

[5] While counsel cannot determine whether the Commission interpretation of Jersey Central's phase-in provision resulted from a legal determination or from a factual finding, the decision below treated it as an exclusively legal issue. As a result, the Commission's factual findings, if any, have undergone no judicial review despite Jersey Central's claim before the Court of Appeals that the Commission ignored disputed factual questions.



circuit's conclusion that the Commission does have the power to approve such tariff provisions, provided they are found to be just and reasonable.[6]

As we next discuss, this conflict, and in particular the position adopted by the Commission and affirmed by the court below, has implications affecting virtually all aspects of public utility ratemaking.

### B. *The Decision Below Unduly Expands the Rule Against Retroactive Ratemaking in a Fashion Which Necessarily Invalidates Numerous Other Current Ratemaking Practices.*

The rule against retroactive ratemaking, in conjunction with the filed rate doctrine, invalidates any attempt by an electric utility to implement service charges which seek to recover for costs properly allocated to the period prior to the effectiveness of a prospective rate change. The rule against retroactive ratemaking is derived from the requirement under Section 205(c) of the Federal Power Act, 16 U.S.C. § 824d(c) (1976), that wholesale electric rates be filed with the Commission, from the prohibition in Section 205(d) of the Act, 16 U.S.C. § 824d(d) (1976), against any alteration in the utility's rates except after sixty days notice, and from this Court's recognition that, under the Federal Power Act, the Com-

[6] The court below believed its approach to be identical to the approach the United States Court of Appeals for the Fourth Circuit followed in *Virginia Electric & Power Co. v. FERC*, 580 F.2d 710 (4th Cir. 1978) (per curiam). The fourth circuit, however, apparently thought it was reviewing a factual determination, *id.* at 712 n.5, rather than a case in which the legal interpretation of a tariff would be unaffected by proffered evidence. (App. A, p. 9a, *infra*). Given this circumstance, the fourth circuit's analysis is inapplicable because Jersey Central received no opportunity to resolve disputed factual questions at a hearing.

mission has been denied the authority to award reparations. Unless the rule against retroactive ratemaking applies, the Commission cannot reject any properly filed tariff in the absence of a finding that it is unjust, unreasonable, unduly preferential or discriminatory. *See* 16 U.S.C. §§ 824d(a), (b) (1976); *cf. NAACP v. FPC*, 425 U.S. 662, 670 (1976).

The Commission's reliance on the rule against retroactive ratemaking extended that rule far beyond the scope of its judicial and statutory origins. Since the result below permits the Commission to abrograte its responsibility under Section 205(e) of the Federal Power Act, 16 U.S.C. § 824d(e) (1976), to determine whether electric utility tariff proposals are just and reasonable, petitioner submits that this extension is unwarranted.

The retroactive ratemaking proscription originated in *Hope Natural Gas Company, supra* at 618-19. That case involved an attempt to set aside Commission findings regarding the justness and reasonableness of utility rates charged *prior* to the effective date of the applicable agency order. The Commission had conceded it lacked the power to enforce the challenged findings. In contrast, this case involves a prospective tariff provision concerning which there have been no Commission findings, except the finding that the tariff provision attempts to recover for cash outlays made to purchase fuel during the efficacy of petitioner's prior tariff.

The determination whether a tariff violates the rule against retroactive ratemaking must begin with the assignment of the various cost elements recovered by the tariff to appropriate time periods. At the minimum, the assigning process should operate consistently. Yet the decision below assigns Jersey Central's fuel expenses to the month



when they were incurred rather than the month they were accrued, while every other cost element is assigned on the basis of accrual accounting. Accrual accounting is in accord with the sound accounting principle of endeavoring to match expenses with associated revenues. Were this method applied to Jersey Central's fuel expenses, then the phase-in provision could not be said to recover any "costs" which are properly allocated to a period prior to the effectiveness of the tariff, and the tariff could not violate the rule against retroactive ratemaking.

To accept the Commission's retroactive ratemaking conclusion as a basis for rejecting tariff proposals would invalidate major components of many electric utility tariffs filed with the Commission. For example, it would proscribe any attempt by an electric utility to recover from its customers capitalized maintenance expenses or extraordinary property losses incurred in one period but amortized over later periods. It would also invalidate that part of Section 35.22(e)(3) of the Commission's Rules, 18 C.F.R. § 35.22(e)(3), which allows electric utilities to recover research and development expenditures incurred prior to the effective date of a new tariff. Section 35.22(e)(3) expressly permits recovery even if the utility's preceding tariff did not provide for compensatory charges or charged an amount insufficient to cover actual expenditures. These examples establish that the rule against retroactive ratemaking does not invalidate tariff provisions, such as Jersey Central's phase-in provision, which seek to recover for past cash expenditures which are properly allocated as "costs" to future periods. As a result, the third circuit's opinion should be reviewed and the Commission should be required to determine whether that phase-in provision is just and reasonable.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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## Appendices

APPENDIX A

# United States Court of Appeals

FOR THE THIRD CIRCUIT

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**No. 78-1185**

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JERSEY CENTRAL POWER & LIGHT COMPANY,
*Petitioner*

*v.*

FEDERAL ENERGY REGULATORY COMMISSION,
*Respondent*

ALLEGHENY ELECTRIC COOPERATIVE, INC.,
*Intervenor*

BOROUGHS OF MADISON, BUTLER, LAVALLETTE,
AND SEASIDE HEIGHTS, NEW JERSEY,
*Intervenors*

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ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION
(FERC No. ER76-813)

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Argued October 6, 1978

Before: ROSENN and WEIS, *Circuit Judges* and
HANNUM, *District Judge.**

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* Honorable John B. Hannum, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

(Opinion filed December 8, 1978)

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## OPINION OF THE COURT

WEIS, *Circuit Judge.*

The fuel adjustment clause is a controversial reaction to some of the problems created by the energy crisis. The interpretation by the Federal Energy Regulatory Commission of an electrical utility's tariff containing such a provision is the subject of this petition for review. We



conclude that the Commission committed no error in construing the clause as one calling for current charges rather than for past expenses. Accordingly, since there was no "billing lag," the utility was not entitled to employ a phase-in arrangement in a new tariff to recover "unbilled" expenses.

In response to rapidly escalating fuel costs, Jersey Central Power & Light Company prepared and filed a tariff with the Federal Power Commission[1] incorporating a fuel adjustment clause for charges to be collected from its wholesale customers.[2] The clause became effective on December 2, 1973, and read in pertinent part:

"An energy cost adjustment factor shall be applied to each kilowatt-hour supplied under this tariff. This energy cost adjustment determined ... in accordance with the formula set forth below, shall be applied to all kilowatt-hours supplied during the billing month."

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[1] Pursuant to the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565, and Executive Order No. 12009, 42 Fed. Reg. 46267, the Federal Energy Regulatory Commission (FERC) became active as an independent commission within the Department of Energy on October 1, 1977, and the Federal Power Commission (FPC) ceased to exist. Under the savings provision of the Act, § 705(b), proceedings pending before the FPC were continued and under § 402(a)(1) were transferred to the FERC.

[2] To protect the utilities from the ever-fluctuating fuel costs and to reduce the number of rate-filing proceedings, the Commission has allowed the companies to incorporate fuel adjustment clauses as a part of the energy charges to customers. This arrangement permits recovery automatically through formulae designed to reflect the difference between the base cost and the current cost of fuel used to produce kilowatt-hours of electricity. *See* 18 C.F.R. § 35.14.

Under Jersey Central's fuel clauses, actual costs for a three-month period ending two months prior to the billing month are determined on a per kilowatt-hour basis. These costs are indexed against a base cost per kilowatt-hour. The difference is then expressed as a "factor" which increases—or decreases—in cents per kilowatt-hour the charge for each kilowatt-hour sold in a billing month.

There followed a formula that included as factors the cost of fuel and sales in current and base periods, taxes, and a component for adjustment of losses to the delivery voltage. In defining current sales and fuel costs, the tariff stated that these "factors are to be determined as the three month totals for the period ending with the second calendar month preceding the billing month."

With some revisions not material here, Jersey Central billed its customers under the new arrangement until July 27, 1976, when the company filed a proposed new schedule of wholesale electric rates, including a three-step increase in the base cost component of the fuel adjustment clause. This phase-in mechanism[3] was designed to recover "unbilled fuel costs" still owed by customers, according to the utility, under the superseded adjustment clause. The contention was that such a device, similar in effect to temporary surcharges, was needed to recoup fuel costs already incurred. Because the original fuel adjustment charge was based on a time period ending two months before the billing date, the company asserted that a billing lag had resulted.

The boroughs of Lavallette, Madison, Butler, and Seaside Heights, and Allegheny Electric Cooperative, Inc., wholesale customers of Jersey Central, intervened and urged rejection of the proposed fuel adjustment clause as an attempt to retroactively recover fuel costs which the

[3] Jersey Central's phase-in program was an integral part of the adustment clause, and provided that the base cost in the present fuel clause would be effective for the first two months after the proposed base rates became effective. In the next (third) month, the base cost in the present clause would be given a two-thirds weighting and the base cost reflecting 1976 fuel costs a one-third weighting. In the fourth month, the base cost in the present clause would be given a one-third weighting and the base cost reflecting 1976 costs a two-thirds weighting. In all subsequent months, the 1976 base cost would be fully effective. It is the gradual raising of this base index number over several months which constitutes the "phase-in" portion of the clause and the subject of this litigation.



original clause had failed to include. Subsequently, the customers sought severance and summary disposition of the phase-in question in light of *Public Service Co. of New Hampshire*, Opinion Nos. 790 and 790-A, FERC Docket Nos. 790 and 790-A, FERC Docket No. ER76-285 (1977), *petition for review filed*, No. 77-1592 (D.C. Cir.), a decision of the Commission holding illegal a utility's proposed surcharge to recover unbilled fuel costs in a comparable situation. The Commission then issued an order summarily rejecting the phase-in aspect of Jersey Central's rate-filing, finding that this arrangement could not be distinguished from an illegal surcharge. After the Commission denied its application for rehearing, Jersey Central filed this petition for review.

The company contends that its prior fuel adjustment clause was designed to permit recovery for the actual monthly excess fuel costs for the period ending two months before the billing date. Thus, it maintains that when it adopted its new clause on September 27, 1976, there occurred a short fall in its collection for the months of June through September. According to the company, unbilled fuel costs incurred in those months, which were due to be collected under the old fuel clause in the months of October to December, 1976, would not be recouped under the new clause without the phase-in procedure.

The Commission, however, takes the position that the 1973 tariff did no more than establish a formula, based on past experience, *i.e.*, costs incurred during a prior test period, to compute what was in effect an approximation of the excess and still unknown fuel costs for the billable month. It insists that the company did receive the proceeds of the fuel adjustment charge for every month it had been in effect. Under this view, once Jersey Central had collected its adjustment charge for a particular month, the company had assessed all it was entitled to collect, and there were no unbilled fuel costs still owed by the customer. The Commission contends that because the adjustment rate may have been inadequate to some extent in recapturing costs is not justification for a retroactive

charge. Its position is that there was no billing lag and therefore no basis for the phase-in procedure.

The legality of the 1976 clause therefore hinges on the one adopted in 1973. Since the dispute centers on the interpretation of the 1973 tariff, the appropriate place to begin is with its wording, bearing in mind the construction should be that reasonably communicated to those governed by it, and any doubt as to the meaning should be resolved against the filing utility. *Cf. United States v. Missouri-Kansas-Texas Railroad*, 194 F.2d 777 (5th Cir. 1952). *See also Great Northern Railway v. Merchants Elevator Co.*, 259 U.S. 285, 290-91 (1922).

The tariff required that an adjustment factor be "applied to all kilowatt-hours supplied during the billing month." This is inconsistent with the company's premise that the charge was to be a pass-on of *actual* past costs incurred. If that were the aim, then the billing should have been computed on the basis of the kilowatt-hours used during the month in which the fuel charges were actually incurred. If, as Jersey Central argues, it was collecting actual fuel costs on a deferred basis, the company would have had to defer collections for several billing periods before recovering costs for the preceding months. Only in this way could the company avoid inconsistency with the provision that the fuel adjustment factor was to "be applied to each kilowatt-hour supplied under this tariff" and "to all kilowatt-hours supplied during the billing month."

Moreover, the premise underlying the fuel adjustment charge was that the customer should bear the added expense caused by the increased costs of fuel. A customer whose usage fluctuated substantially from month to month, however, would pay more or less than his proportionate share if the usage amount were not the same in the billing month as it had been in the month when the fuel expense was incurred. And, as was argued in the *New Hampshire* case, if the clause authorized the company to recover actual past costs on a deferred basis, then customers newly entering the system would be paying for fuel



charges incurred before they received service and customers leaving the system would avoid paying for fuel used for their benefit.

We think it significant that the tariff stated that the adjustment should be determined "in accordance with the formula set forth," an approach inconsistent with the company's argument that an assessment of actual cost was intended. The tariff provided unmistakably that the charge in the billable month was to be computed on the basis of a specific formula. There was no provision for a charge other than the monthly rate computed under the formula and applied to the kilowatt-hours in the billable month. The fact that the formula was based on costs in a preceding period did not change its effect of providing a method to calculate a current charge rather than to exact a precise recovery of past expenses. Such a formula could as well have been based, for example, on some past wholesale price index or similar factor rather than actual cost incurred, and yet be the basis for a "current" charge.

We are not persuaded that the 1973 tariff did anything other than allow the immediate application of a fuel adjustment charge which had some reasonable relationship to energy cost incurred during a billable month. It was not absolutely accurate, it did not exactly charge each customer with his proportionate share of expense incurred, at least in the beginning, but it did offer a reasonable basis for estimation.[4]

Two cases involving similar fuel adjustment clauses have been reviewed by the Courts of Appeals for the First and the Fourth circuits. In *Virginia Electric & Power Co. v. Federal Energy Regulatory Commission*, 580 F.2d 710

[4] The company concedes that it did bill customers for the fuel service charged in December of 1973 at the time the rate became effective, but now contends that was a mistake and it should have waited several months before imposing the extra charge for the actual costs. The language of the tariff is completely consistent with the conduct of Jersey Central in 1973, and the present contention of the company cannot vary the plain wording of the tariff.

(4th Cir. 1978), the Fourth Circuit, in agreement with our view, took the position that the fuel adjustment clause did not provide for recovery of past excess fuel costs but represented the orthodox use of a test period to arrive at current costs. The First Circuit took a somewhat different approach in *Maine Public Service Co. v. Federal Power Commission*, 579 F.2d 659 (1st Cir. 1978). There, the court felt that the Commission had taken an unduly narrow view of the "filed rate doctrine"[5] based on the Commission's misreading of *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951). Believing that there was error in the Commission's reliance on *Montana-Dakota* as support for its conclusion that it lacked legal authority to allow a surcharge, the court remanded the *Maine* case for further consideration.

We have carefully reviewed the commission's opinion in *New Hampshire*, the seminal decision in the fuel adjustment clause cases, and with due respect to the Court of Appeals for the First Circuit, we do not agree that the agency's ruling there rises or falls on its interpretation of *Montana-Dakota*. Rather, the thrust of the *New Hampshire* case is the construction of the tariff itself. Regardless of whether *Montana-Dakota* forecloses the phase-in here, it appears to us that the Commission is on solid ground in concluding that a reasonable interpretation of the tariff compels the result it reached.

There may be sound reasons to question a general indiscriminate reliance upon administrative expertise but we think it proper to extend some deference to the Commission's interpretation of tariffs, a specialized area in which the agency undoubtedly has extensive experience. In any event, the commission's construction in this case coincides with our own view. *See, e.g., Associated Press v. FCC*, 452 F.2d 1290, 1295-96 (D.C. Cir. 971).

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[5] Under the doctrine, a public utility " can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission." Public Serv. Co. of New Hampshire, *supra*, slip op. at 11, *quoting* Montana-Dakota Util. Co. v. Northwestern Publ. Serv. Co., 341 U.S. 246, 251 (1951).



The company argues that questions of fact remain and that it was, therefore, improper for the Commission to utilize summary disposition in these circumstances. We have examined the company's position on disputed factual issues but conclude that the interpretation of the tariff in this case is a matter of law which would be unaffected by the company's proffered evidence.

We point out that the issue under consideration here goes only to the rejection of the phase-in mechanism of the fuel adjustment clause. That question was severed from the proceeding for consideration of whether the entire clause was just and reasonable. Thus, in no way has the Commission, nor have we, passed on the question whether the clause interpreted as a current charge based on past data is just and reasonable.

The order of the Commission will be affirmed.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit*

(A.O. U.S. Courts, International Printing Co., Phila., Pa.)

APPENDIX B

# United States Court of Appeals

FOR THE THIRD CIRCUIT

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**No. 78-1185**

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JERSEY CENTRAL POWER & LIGHT COMPANY,
*Petitioner*

v.

FEDERAL REGULATORY COMMISSION,
*Respondent*

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Present: ROSENN and WEIS, *Circuit Judges and* HANNUM, *District Judge.**

## ORDER

The petition for rehearing filed by petitioner in the above entitled case having been submitted to the judges who participated in the decision of the court, and after consideration of said petition and Answer filed by the respondent, it is

ORDERED that the petition for panel rehearing is denied.

.....
Circuit Judge

DATED: February 2, 1979

* Honorable John B. Hannum, United States District Court for the Eastern District of Pennsylvania, sitting by designation.



APPENDIX C

# UNITED STATES OF AMERICA
# FEDERAL POWER COMMISSION

ELECTRIC RATES: SUSPENSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, John H. Holloman III, and James G. Watt.

Jersey Central Power and Light Company } **Docket No. ER76-813**

## ORDER ACCEPTING FOR FILING AND SUSPENDING PROPOSED RATE INCREASE, AND ESTABLISHING PROCEDURES

**(Issued August 26, 1976)**

On July 27, 1976, Jersey Central Power and Light Company (Jersey) tendered for filing revised tariff sheets to its FPC Electric Tariff, Original Volume No. 1[1]. The proposed changes would increase revenues from Jersey's six wholesale customers by $1,201,462 (18.4%) based upon estimated sales for the calendar 1976 test period. Jersey requests an effective date of August 27, 1976.

The proposed rate change under the revised tariff rate RP increases the monthly demand charges from $3.18/kw to $3.45/kw and the energy charge from 9 mills/kWh to 20 mills/kWh. The customers monthly credit allowance for untransformed service has been increased from $0.28/kw to $0.29/kw.

Public notice of Jersey's tender was issued on August 4, 1976, with protests and petitions to intervene due on or before August 18, 1976.

[1] Designated as shown in Attachment A.

[2] The Boroughs of Butler, Lavallette, Madison, Pemberton and Seaside Heights, New Jersey, and Allegheny Electric Cooperative, Inc.

The Commission's review of the instant tender indicates that Jersey's proposed tariff sheets have not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory, preferential, or otherwise unlawful. Accordingly, the Commission shall accept for filing and suspend Jersey's proposed tariff sheets until September 27, 1976, when they will be permitted to become effective subject to refund, as hereinafter ordered; and the Commission will establish hearing procedures.

The proposed fuel adjustment clause contained in tariff sheets, Third Revised Sheet No. 15 and Original Sheet No. 16, with the exception of an increased base fuel cost and adjustments purporting to recover unbilled fuel costs, is the same as that filed by Jersey in Docket No. E-9342. Without prejudice to any issues that may be raised by any party or the Commission Staff in the proceedings instituted herein, the proposed rates shall further be made subject to refund in accordance with the outcome of the proceedings in Docket No. E-9342.

**The Commission finds:**

(1) Good cause exists to accept for filing Jersey's proposed tariff sheets submitted on July 27, 1976, and to suspend their operation until September 27, 1976, when they shall be permitted to become effective, subject to refund.

(2) It is proper and necessary in the public interest and to aid in the enforcement of the Federal Power Act that a hearing concerning the lawfulness of Jersey's proposed tariff sheets be commenced.

**The Commission orders:**

(A) Pending a hearing and decision thereon, Jersey's proposed tariff sheets are hereby accepted for filing and suspended from operation until September 27, 1976, when they shall be permitted to become effective, subject to refund.



(B) Pursuant to the authority of the Federal Power Act, particularly Section 205 and 206 thereof, and the Commission's Rules and Regulations, a hearing shall be held concerning the lawfulness and reasonableness of the proposed tariff sheets.

(C) Jersey's proposed tariff sheets are hereby further made subject to refund pending the outcome of proceedings in Docket No. E-9342.

(D) The Commission Staff shall prepare and serve top sheets on all parties for purposes of settlement on or before March 1, 1977. (See Administrative Order No. 157).

(E) A Presiding Administrative Law Judge to be designated by the Chief Administrative Law Judge for that purpose (See Delegation of Authority, 18 CFR 3.5(d)), shall convene a settlement conference in this proceeding on a date certain within 10 days after the service of top sheets by the Staff, in a hearing room of the Federal Power Commission, 825 North Capital Street, N. E., Washington, D. C. 20426. Said Presiding Administrative Law Judge is hereby authorized to establish all procedural dates and to rule upon all motions (with the exceptions of petitions to intervene, motions to consolidate and sever, and motions to dismiss, as provided for in the Rules of Practice and Procedure).

(F) Jersey shall file monthly with the Commission the report on billing determinants and revenues collected under the presently effective rates and the proposed rates filed herein, as required by Section 35.19(a) of the Commission's Regulations, 18 CFR Section 35.19(a).

(G) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

(S E A L)

KENNETH F. PLUMB,
Secretary.

**ATTACHMENT A**

**JERSEY CENTRAL POWER & LIGHT COMPANY,**

**Docket No. ER76-813**

Filed: July 27, 1976
Nature: Change in tariff rates.

| Designation | Description |
|---|---|
| First Revised Sheet No. 2 (Supersedes Original Sheet No. 2) | Table of Contents |
| First Revised Sheet No. 7 (Supersedes Original Sheet No. 7) | Service Agreement |
| First Revised Sheet No. 9 (Supersedes Original Sheet No. 9) | General Terms and Conditions |
| First Revised Sheet No. 11 (Supersedes Original Sheet No. 11) | General Terms and Conditions |
| Second Revised Sheet No. 13 (Supersedes First Revised Sheet No. 13) | Resale Power Service Rate RP |
| Second Revised Sheet No. 14 (Supersedes First Revised Sheet No. 14) | Resale Power Service Rate RP |
| Third Revised Sheet No. 15 (Supersedes Second Revised Sheet No. 15) | Fuel Adjustment Clause |
| Original Sheet No. 16 | Fuel Adjustment Clause |



**APPENDIX D**

# UNITED STATES OF AMERICA
# FEDERAL POWER COMMISSION

ELECTRIC RATES:

Before Commissioners: Richard L. Dunham, Chairman; John H. Holloman III, and James G. Watt.

JERSEY CENTRAL POWER AND LIGHT COMPANY } **Docket No. ER76-813**

## ORDER GRANTING INTERVENTIONS, DENYING REQUESTS FOR REJECTION OR SUMMARY DISPOSITION OF FUEL ADJUSTMENT CLAUSE, AND DENYING REQUESTS FOR FIVE-MONTH SUSPENSION

**(Issued September 20, 1976)**

On July 27, 1976, Jersey Central Power and Light Company (Jersey) tendered for filing revised tariff sheets to its FPC Electric Tariff, Original Volume No. 1. The proposed changes would increase revenues from Jersey's six wholesale customers by $1,201,462 (18.4%) based upon estimated sales for the calendar 1976 test period.

Public notice of Jersey's tender was issued on August 4, 1976, with protests and petitions to intervene due on or before August 18, 1976.

On August 18, 1976, the Boroughs of Butler, Lavallette Madison, Pemberton, and Seaside Heights, New Jersey, (Boroughs) timely filed a petition to intervene, motion to reject the proposed fuel adjustment clause, and request for five-month suspension of Jersey's filing. On August 18, 1976, Allegheny Electric Cooperative, Inc. (Allegheny) timely filed a protest and petition to intervene requesting

summary disposition of the proposed fuel adjustment clause and otherwise similar relief. By answers dated August 19, 1976, and August 23, 1976, Jersey opposed rejection of the proposed fuel adjustment clause and suspension of its filing for five months.

Having reviewed the petitions to intervene, the Commission believes the Boroughs and Allegheny have sufficient interest in this proceeding to warrant intervention.

The Boroughs and Allegheny request rejection or summary disposition of Jersey's proposed fuel adjustment clause in that it provides for phasing in the new base cost of fuel in order to recover allegedly unbilled fuel costs which they argue is in violation of the Commission's Regulations, constitutes retroactive ratemaking, and provides for double recovery of fuel costs. The Commission believes that the justness and reasonableness of Jersey's proposed fuel adjustment clause should be subject to the hearing procedures established in our prior order issued August 26, 1974, in this docket.

In that order, the Commission determined that a one-month suspension is appropriate based on our review of Jersey's filing. The Boroughs argue that a five-month suspension of Jersey's filing is proper because Jersey's proposed rate increase will place an overwhelming financial burden on the Boroughs, the Boroughs will experience delay in passing on the rate increase to retail customers because of community and state legal procedures, and a five-month suspension will have a *de minimis* effect on Jersey because of the small percentage of revenues involved compared to Jersey's total electric revenues. Allegheney argues that a five-month suspension is appropriate because its analysis shows that Jersey's cost of service study and rate of return are much too high. Upon further review and considering the arguments of the Boroughs and Allegheny and Jersey's answers thereto, we reaffirm our prior order and conclude that the one-month suspension is proper. The period of suspension is a matter within the Commission's discretion. *Municipal Light Boards* v. *F.P.C.*, 450 F. 2d 1341, 1352 (1971).



In its petition to intervene, the Boroughs argue that Jersey's proposed rate increase will create a "price squeeze" and impair the Boroughs ability to compete for retail loads, which issue the Supreme Court has ruled the Commission has jurisdiction to consider and remedy[1], and the Boroughs attach a graph in support thereof comparing the proposed wholesale rate with retail rates. The Boroughs also take issue with Jersey's inclusion of minimum bank balances in working capital. In its petition to intervene and protest, Allegheny reserves its right to raise the price squeeze issue after completing discovery and takes issue with Jersey's inclusion of compensating bank balances in working capital, level of the rate of return on equity, failure to reflect savings from the filing of a consolidated tax return by using the statutory Federal income tax rate, the rate of capitalization of allowance for funds used during capitalization, inclusion of investment in coal reserves in rate base, failure to annualize test period interest expense for income tax deduction purposes, the proposed rates earning higher overall rate of return and rate of return on common equity in the test period than that requested by Jersey and earning a different overall rate of return for Transmission Service than for Primary Service, and increase in the notice of termination period from one year to three years; and Allegheny urges rejection of the 60% demand ratchet and the applicability provision requiring the customer to purchase full requirements. In its answers, Jersey presents opposing exhibits comparing a retail rate with the proposed wholesale rate to argue against the existence of a price squeeze and argues that the Boroughs have failed to plead the minimum requirements for an evidentiary hearing to be held on that issue; and Jersey also presents counter arguments to the other issues raised by the Boroughs and Allegheny and state that they are properly subject to hearing. The Commission believes that the price squeeze issue as well as all the other issues mentioned,

[1] *FPC* v. *Conway Corp. et al.*, No. 75-343, decided June 7, 1976.

*supra*, should be subject to the hearing procedures established in our prior order and all parties given an opportunity to present evidence thereon.

**The Commission finds:**

(1) The participation of the Boroughs and Allegheny in this proceeding may be in the public interest.

(2) Good cause exists for denying rejection of the proposed fuel adjustment clause.

(3) Good cause exists to deny the Boroughs and Allegheny's request for a five-month suspension.

**The Commission orders:**

(A) The Boroughs and Allegheny are hereby permitted to intervene in this proceeding subject to the rules and regulations of the Commission: *Provided, however,* that participation of such intervenors shall be limited to matters affecting asserted rights and interests as specifically set forth in their petitions to intervene; and *Provided, further,* that the admission of such intervenors shall not be construed as recognition by the Commission that they might be aggrieved because of any order or orders of the Commission entered in this proceeding.

(B) The Boroughs' motion to reject and Allegheny's request for summary disposition of the proposed fuel adjustment clause are hereby denied.

(C) The Boroughs' and Allegheny's requests for a five-month suspension period are hereby denied.

(D) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

( S E A L )

KENNETH F. PLUMB,
Secretary.



**APPENDIX E**

# UNITED STATES OF AMERICA
# FEDERAL POWER COMMISSION

ELECTRIC RATES: REHEARING

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, John H. Holloman III, and James G. Watt.

Jersey Central Power and Light Company } **Docket No. ER76-813**

## ORDER DENYING REHEARING

**(Issued October 22, 1976)**

On September 24, 1976, the Boroughs of Butler, Lavallette, Madison, Pemberton, and Seaside Heights, New Jersey, filed an application for rehearing of the Commission's orders issued August 26, 1976, and September 20, 1976, in the above-captioned docket. The Boroughs argue that the Commission erred in failing to reject Jersey Central Power and Light Company's (Jersey Central) proposed fuel adjustment clause, which provides for the phasing-in of the new base cost of fuel in order to recover allegedly unbilled fuel costs, and that the Commission erred in suspending Jersey Central's proposed wholesale rate increase for one month rather than the maximum suspension period of five months. For the reasons hereinafter stated, the Commission will deny the Boroughs application for rehearing.

In their application for rehearing, the Boroughs claim that the Commission erred in failing to reject Jersey Central's fuel clause 'phase-in' as both patently deficient in form by failing to comply with Section 35.14 of the Commission's Regulations and a substantive nullity in

constituting retroactive ratemaking citing *Municipal Light Boards* v. *F.P.C.*, 450 F. 2d 1341 (1971). In the September 20, 1976 order, the Commission considered the Boroughs request for rejection of Jersey Central's proposed fuel adjustment clause on the grounds that it provides for phasing-in the new base cost of fuel in order to recover allegedly unbilled fuel costs which the Boroughs argue is in violation of the Commission's Regulations, constitutes retroactive ratemaking, and provides for double recovery of fuel costs. The Commission stated in that order that it believed that the justness and reasonableness of Jersey Central's proposed fuel adjustment clause should be subject to the hearing procedures previously established. The Commission does not believe that Jersey Central's proposed fuel adjustment clause 'phase-in' is patently deficient in form or a substantive nullity so as to warrant rejection as argued by Boroughs. The Commission adheres to its prior determination that the justness and reasonableness of Jersey Central's proposed fuel clause should be subject to the hearing procedures previously established.

In their application for rehearing, the Boroughs argue that the Commission erred in failing to suspend Jersey Central's proposed rate increase for the maximum statutory period of five months and erred in failing to explain the Commission's exercise of its suspension discretion. The Boroughs argue that the Commission failed to take note or consider the Boroughs' "Petition, Complaint, Motion and Request" filed on August 18, 1976, in the Commission's determination of the one month suspension period in the August 26, 1976, order. However, the Commission considered the arguments of the Boroughs and reaffirmed its one month suspension in the September 20, 1976, order[1]. The Commission has examined Jersey Central's filing, the pleadings filed by the Boroughs, the other intervenor, Allegheny Electric Cooperative, Inc., and Jersey Central's answers thereto, in determining that a one month

[1] See mimeo p. 2.



suspension period is proper. The Commission once again adheres to that determination herein and accordingly denies the Boroughs application for rehearing. The length of the suspension period is within the Commission's discretion. *Municipal Light Boards* v. *F.P.C.*, 450 F. 2d 1341,1352 (1971).

**The Commission finds:**

Good cause exists to deny the Boroughs application for rehearing.

**The Commission orders:**

(A) The Boroughs application for rehearing filed September 24, 1976, is hereby denied.

(B) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

(S E A L)

KENNETH F. PLUMB,
Secretary.

**FUEL ADJUSTMENT CLAUSE SUMMARY JUDGMENT**

APPENDIX F

# UNITED STATES OF AMERICA FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Charles B. Curtis, Acting Chairman;
Don S. Smith and Georgiana Sheldon, Acting Commissioners.

Jersey Central Power and Light Company } **Docket No. ER76-813**

## ORDER GRANTING MOTION FOR SUMMARY DISPOSITION

**(Issued October 25, 1977)**

On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), the Federal Power Commission ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary and the Federal Energy Regulatory Commission (FERC) which, as an independent commission within the Department of Energy, was activated on October 1, 1977.

The "savings provisions" of Section 705(b) of the DOE Act provide that proceedings pending before the FPC on the date the DOE Act takes effect shall not be affected and that orders shall be issued in such proceedings as if the DOE Act had not been enacted. All such proceedings shall



be continued and further actions shall be taken by the appropriate component of DOE now responsible for the function under the DOE Act and regulations promulgated thereunder. The functions which are the subject of these proceedings were specifically transferred to the FERC by Section 402(a)(1) of the DOE Act.

The joint regulation adopted on October 1, 1977 by the Secretary and the FERC entitled "Transfer of Proceedings to the Secretary of Energy and the FERC," 10 CFR , provided that this proceeding would be continued before the FERC. The FERC takes action in this proceeding in accordance with the above mentioned authorities.

On July 27, 1976 Jersey Central Power and Light Company tendered for filing revised tariff sheets to its FPC electric tariff. The proposed rate changes would increase revenues from Jersey's six wholesale customers by $1,201,462 based upon estimated sales for the calendar year 1976 test period. Included within Jersey's proposed rate increase was a proposed fuel adjustment clause which effected a change in the base cost of fuel and eliminated the three month billing lag feature of the superseded fuel clause. The proposed fuel adjustment clause also contained a phase-in provision to permit the company to recover allegedly unrecovered revenues under the old fuel adjustment clause.

By orders issued September 20, 1976 and October 22, 1976 the Commission rejected Intervenors' original attempt to have the fuel adjustment clause phase-in issue summarily disposed of. The Commission determined that the phase-in procedure under the fuel adjustment clause should be set for hearing in order to determine its justness and reasonableness. Since that time the Commission has issued Opinion No. 790[1] determining the legality of a proposed fuel adjustment clause surcharge. In that proceeding the Commission determined that a proposed fuel adjustment clause surcharge, similar to the phasing-in

[1] *Public Service Company of New Hampshire*, Docket No. ER76-285 (March 21, 1977).

procedure proposed here, could not legally be imposed under the Federal Power Act. Since that time the Commission has ruled in several other proceedings that similar proposals were equally unlawful.[2]

On June 16, 1977 Intervenors, the Boroughs of Butler, Lavallette, Madison, Pemberton and Seaside Heights, New Jersey (Boroughs) filed a motion for severance of the fuel adjustment clause surcharge issue and summary disposition thereof. Boroughs' motion alleges that the proposed "phase-in" provision is identical to the fuel adjustment clause surcharge proposed by Public Service Company of New Hampshire and rejected in Opinion No. 790. Boroughs point out that Jersey, in earlier filings in this proceeding, has repeatedly stated that its phasing-in procedure was identical in principle and objective to the surcharge proposed by Public Service Company of New Hampshire. Boroughs point out that all of the arguments raised by Jersey in support of its phase-in have been considered and rejected by the Commission in the cases dealing with fuel adjustment clauses surcharges.

A response in support of Boroughs' motion was filed by Allegheny Electric Cooperative, Inc. Allegheny contends that nothing would be gained by relitigation of the legal issues which the Commission has already decided in Opinions No. 790 and 790-A. Allegheny further contends that imposition of the phase-in by Jersey Central would result in double recovery for the period of the phase-in. Commission Staff filed a motion joining the motion of the Boroughs requesting summary disposition of the fuel clause surcharge issue. Staff contends that there is no dispute over the material facts and that the matter is ripe for summary disposition.

Jersey Central filed a response in opposition to the Boroughs' motion for summary judgment. Jersey Central states that while, at one time, it believed its situation was

[2] See e.g. *Maine Public Service Company*, Docket No. E-8264 (June 27, 1977); *Virginia Electric Power Company*, Docket No. ER76-415 (June 20, 1977).



similar to that involved in *Public Service Company of New Hampshire*, it alleges that the basis upon which the Commission reached its conclusion in Opinion No. 790 caused it to believe that there are important factual and legal differences which must be developed on the record in this proceeding. Jersey Central failed to provide any basis to support its belief that this case can be distinguished from the other surcharge cases.

We do not believe that there are any questions of fact which necessitate an evidentiary hearing on the fuel adjustment phase-in. This lack of factual or legal issues permits us to summarily dispose of the issue.[3] Jersey Central has argued that its fuel adjustment clause phase-in is identical to the proposed surcharge found illegal in Opinion 790. We can see no features in the Jersey Central proposal that would distinguish it from the fuel adjustment surcharges that the Commission has rejected in the past. Our determinations in Public Service Company of New Hampshire and in the subsequent surcharge cases were based on the filed rate doctrine and on the Federal Power Act proscription of retroactive rate making. The factors set out there are equally applicable to this proceeding and we do not believe it is necessary for the hearing in this matter to consider Jersey Central's proposed phase-in.[4]

**The Commission finds:**

The motion for severance of the fuel adjustment clause surcharge issue the summary disposition and refund filed on June 16, 1977 should be granted.

**The Commission orders:**

(A) The motion filed on June 15, 1977 for severance of the fuel adjustment clause surcharge issue and summary disposition is hereby granted.

[3] *Citizens for Allegan County, Inc.* v. *F.P.C.* 414 F.2d 1125 (D.C. Cir. 1969).

[4] *Appalachian Power Company*, Docket No. ER77-325 (June 30, 1977).

(B) The issue of Jersey Central's proposed phase-in is hereby severed from this proceeding and that portion of Jersey Central's filing is rejected.

(C) Within 90 days from the date of this order Jersey Central Power and Light Company shall refund to its customers all amounts, if any, collected under its proposed fuel adjustment clause phase-in together with interest at a rate of 9 percent per annum from the date of payment to applicant to the date of refund.

(D) Within 90 days from the date of this order Jersey Central Power and Light Company shall file substitute tariff sheets reflecting changes in its fuel adjustment clause consistent with this order.

(E) Within fifteen days after refunds have been made Jersey Central shall file with the Commission a compliance report showing monthly billing determinants and revenues under prior, present, and adjudicated rates; monthly adjudicated rate increase, monthly rate refund, and the monthly interest computation, together with a summary of such information for the total refund period. A copy of such report shall also be furnished to each state commission within whose jurisdiction the wholesale customer distributes and sells electric energy at retail.

By the Commission.

( S E A L )

Kenneth F. Plumb,
Secretary.



**FUEL ADJUSTMENT CLAUSE SUMMARY JUDGMENT**

**APPENDIX G**

# UNITED STATES OF AMERICA FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Don S. Smith, Acting Chairman; Georgiana Sheldon, Matthew Holden, Jr. and George R. Hall.

Jersey Central Power and Light Company } **Docket No. ER76-813**

## ORDER DENYING REHEARING

**(Issued December 23, 1977)**

On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), the Federal Power Commission ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary and the Federal Energy Regulatory Commission (FERC) which, as an independent commission within the Department of Energy, was activated on October 1, 1977.

The "savings provisions" of Section 705(b) of the DOE Act provide that proceedings pending before the FPC on the date the DOE Act takes effect shall not be affected and that orders shall be issued in such proceedings as if the DOE Act had not been enacted. All such proceedings shall be continued and further actions shall be taken by the

appropriate component of DOE now responsible for the function under the DOE Act and regulations promulgated thereunder. The functions which are the subject of these proceedings were specifically transferred to the FERC by Section 402(a)(1) of the DOE Act.

The joint regulation adopted on October 1, 1977 by the Secretary and the FERC entitled "Transfer of Proceedings to the Secretary of Energy and the FERC," 10 CFR—provided that this proceeding would be continued before the FERC. The FERC takes action in this proceeding in accordance with the above mentioned authorities.

On November 23, 1977 Jersey Central Power and Light Company filed an application for rehearing of the Commission's October Order granting a motion for summary disposition. Jersey Central had proposed a revised fuel adjustment clause which affected a change in the base cost of fuel and contained the phase-in provision to permit the company to recover allegedly unrecovered revenues under the old fuel adjustment clause. The Commission determined that this was comparable to the proposed fuel adjustment clause surcharge rejected in previous proceedings and therefore granted summary disposition.[1]

In its application for rehearing, Jersey Central argues that it is merely seeking to recover costs incurred from June 1976 through September 26, 1976, but unrecovered under the old fuel adjustment clause. Jersey Central argues that the Commission's adoption of the "proxy" theory in this proceeding is totally unsupportable. The application for rehearing maintains that the Commission gave too much weight to the start-up procedures employed by Jersey Central in originating its fuel adjustment clause. Jersey Central admits that it improperly instituted immediate billing under its fuel clause and that that constituted retroactive ratemaking. Although that did constitute retroactive ratemaking, Jersey Central argues that the proposed phase-in is not.

[1] Opinion No. 790, *Public Service Company of New Hampshire*, Docket No. ER76-285 (March 21, 1977); *Maine Public Service Company*, Docket No. E8264 (June 27, 1977); *Virginia Electric Power Company*, Docket No. ER76-415 (June 20, 1977).



Jersey Central points out that there is no language in its fuel clause that even hints that the past three month period constitutes an estimate of or "proxy" for current month fuel cost. The application points to the adoption of deferred fuel cost accounting as an indication of Jersey Central's true intent. Jersey Central further notes the action of the New Jersey Board of Public Utilities in approving a retail fuel adjustment clause containing a similar phase-in provision. According to Jersey Central, the regulations of this Commission provide for recovery of actual costs, and that is what Jersey Central is attempting.

The application for rehearing is the first pleading in which Jersey Central has attempted to set out a basis for distinguishing its fuel adjustment clause phase-in from the proposed surcharge at issue in Opinion No. 790. In earlier pleadings, Jersey Central maintained that its proposed phase-in was identical in principle and objective to the surcharge proposed by Public Service Company of New Hampshire and rejected in Opinion No. 790. As Jersey Central pointed out in an earlier pleading in this proceeding, "the fact that Jersey Central proposes to recover unbilled fuel costs through the actual operation of the fuel clause rather than through a surcharge is strictly one of form."[2]

The procedure used by Jersey Central to initiate its fuel adjustment clause in 1973 is strong evidence of Jersey Central's intent regarding that clause. In initiating its fuel adjustment clause, Jersey Central collected for the first month, based on cost incurred during the prior three month period, before the fuel clause took effect. Jersey Central now attempts to argue that this constituted retroactive ratemaking. We believe Jersey Central's actions in starting up its fuel adjustment clause is strong evidence that Jersey Central intended its fuel adjustment clause to recover costs for a given month based on costs incurred during a prior test period.

[2] Answer of Jersey Central Power and Light Company to Application for Rehearing of Boroughs, filed October 6, 1976, page 2.

The burden of preparing a fuel adjustment clause that would recover all properly recoverable fuel costs is on the applicant. The Commission is not in a position to guarantee the recovery of all costs. The fact that Jersey Central's old fuel adjustment clause did not adequately compensate it does not permit this Commission to compensate Jersey Central for that failure under its current fuel adjustment clause. As the Supreme Court stated:

> "The company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must, under the theory of the act, shoulder the hazards incident to its action including not only the refund in the illegal gain but also its losses where its filed rate is found to be inadequate."[3]

As Jersey Central stated, its phase-in procedure is identical to a surcharge and there is no factual or legal basis for distinguishing them. Accordingly, the Commission's granting of the motion for summary disposition must stand. We would point out that our decision only relates to the phasing-in issue as it is comparable to a surcharge. Our decision was in no way intended to affect other issues, if any, revolving around Jersey Central's proposed fuel adjustment clause.

**The Commission finds:**

Jersey Central's application for rehearing filed November 23, 1977 should be denied.

**The Commission orders:**

Jersey Central's application for rehearing is hereby denied.

By the Commisson.

( S E A L )

KENNETH F. PLUMB,
Secretary.

[3] *FPC* v. *Tennessee Gas Transmission Company*, 371 U.S. 145, 153, (1962).





APPENDIX H

# UNITED STATES OF AMERICA
# FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Charles B. Curtis, Chairman;
Don S. Smith,
Georgiana Sheldon,
Matthew Holden, Jr., and
George R. Hall.

Jersey Central Power and Light Company } Docket No. ER76-813

## ORDER DENYING STAY

(Issued January 20, 1978)

On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), the Federal Power Commission[1] ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary of Energy and the Federal Energy Regulatory Commission (FERC) which, as an independent commission within the Department of Energy, was activated on October 1, 1977.

The "savings provisions" of Section 705(b) of the DOE Act provide that proceedings pending before the FPC on the date the DOE Act takes effect shall not be affected and that orders shall be issued in such proceedings as if the

[1] The "Commission" when used in the context of an action taken prior to October 1, 1977, refers to the FPC; when used otherwise, the reference is to the FERC.

DOE Act had not been enacted. All such proceedings shall be continued and further actions shall be taken by the appropriate component of DOE now responsible for the function under the DOE Act and regulations promulgated thereunder. The functions which are the subject of this proceeding were specifically transferred to the FERC by Section 402(a) (1) or 402(a) (2) of the DOE Act.

The joint regulation adopted on October 1, 1977 by the Secretary and the FERC entitled "Transfer of Proceedings to the Secretary of Energy and the FERC," 10 CFR , provided that this proceeding would be continued before the FERC. The FERC takes action in this proceeding in accordance with the above mentioned authorities.

On July 27, 1976, Jersey Central Power & Light Company (Jersey Central) tendered for filing revised tariff sheets to its FPC electric tariff. Included within Jersey Central's proposed rate increase was a proposed fuel adjustment clause which effected a change in the base cost of fuel contained in the superseded fuel clause. The proposed fuel adjustment clause also contained a phase-in provision to permit Jersey Central to recover allegedly unrecovered revenues under the superseded fuel adjustment clause.

On October 25, 1977, the Commission issued an Order Granting Motion for Summary Judgment. This October 25, 1977 order stated, *inter alia*, that the issue of Jersey Central's proposed phase-in was severed from this proceeding and that that portion of Jersey Central's filing was rejected. By order of December 23, 1977, the Commission denied Jersey Central's application for rehearing.

Now we come to the instant motion before us. On January 5, 1978, Jersey Central filed a motion asking the Commission to stay Jersey Central's refund obligations pursuant to the orders of October 25, 1977, and December 23, 1977, pending their judicial review.[2] Jersey Central further asks that if the Commission denies Jersey Central's Motion For Stay and if the Court of Appeals overturns the Commission, that the Commission state that

[2] Refunds pursuant to those orders involving the proposed fuel clause phase-in are due January 23, 1978.



Jersey Central can institute a rate surcharge to recoup, with interest, the amount it refunds.

Jersey Central contends that its requested stay meets the test laid down by *Virginia Petroleum Jobbers Association* v. *F.P.C.*, 259 F. 2d 921 (D.C. Cir. 1958) as recently modified in *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

The Commission has adopted the criteria in *Virginia Jobbers, supra*, in ruling on motions for stay.[3] In order to satisfy the test laid out by the Court an applicant must make a strong showing that it is likely to prevail on the merits of its appeal, it must show that without such relief it will be irreparably injured, that an issuance of a stay would not substantially harm other parties interested in the proceedings, and that the public interest supports the issuance of a stay. *Virginia Jobbers* must now be read in conjunction with *Holiday Tours, supra*, in which the Court declined to read the probability of success criterion in an exceedingly precise, technical sense:

> Instead, we hold that under *Virginia Petroleum Jobbers* a court, *when confronted with a case in which the other three factors strongly favor interim relief* may exercise its discretion to grant a stay if the movant has made a substantial case on the merits. The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed, as in this case, may grant a stay even though its own approach may be contrary to movant's view of the merits. The necessary "level" or "degree" of possibility of success will vary according to the

[3] e.g., *Municipal Light Boards of Reading and Wakefield, Massachusetts, et al.* v. *Boston Edison Company*, Docket Nos. E-7400, et al., Order Denying Motion For Stay, issued September 22, 1975; *Northern States Power Company (Minnesota)*, Docket No. E-9148, Order Denying Application For Rehearing And Motion For Stay, issued December 5, 1975.

court's assessment of the other factors. 559 F.2d at 843 [Emphasis added].

Jersey Central contends that it will suffer irreparable financial injury if it is forced to make refunds to its customers before the final decision on appeal. Jersey Central contends, on the other hand, that its customers will be adequately protected by the Commission's requirements that any refunds paid be paid with interest so that should Jersey Central not prevail on appeal its customers will not suffer. Jersey Central further argues, that since the customers are already protected by virtue of Jersey Central's refund liability, the public interest lies in granting Jersey Central a stay since otherwise Jersey Central will go unprotected if the rate is eventually found to be just and reasonable and in all likelihood will be denied the opportunity to earn a fair rate of return.

Jersey Central's Motion For Stay must be denied. The Commission has determined that the public interest does not permit the imposition of the proposed fuel adjustment clause phase-in provision. Having made this determination it follows that Jersey Central can not be permitted to retain the benefits of the illegal fuel adjustment clause phase-in provision pending final judicial review. Jersey Central has not made an adequate showing that it will be irreparably injured without the granting of this stay. Should the Commission's decision eventually be overturned on appeal, the Court, or the Commission, would be empowered to order Jersey Central to be placed in the same position it would have been had the Commission approved the fuel adjustment clause phase-in provision as originally filed. This would include reinstitution of the proposed fuel adjustment clause phase-in provision (or a surcharge provision) and a provision permitting Jersey Central to recover interest on the amounts at issue.[4]

[4] *Maine Public Service Company*, Docket No. E-8264, issued November 9, 1977; *Public Service Company of New Hampshire*, Docket No. ER76-285, issued October 7, 1977; *Boston Edison Company*, Docket No. ER77-558, *et al.*, issued September 15, 1977.



Further, Jersey Central's assertion that its customers will not be harmed because they will eventually get their refunds overlooks the fact that the protection afforded by refunds may be inadequate to fully protect the consumers' interest, *F.P.C.* v. *Hunt*, 376 U.S. 515, 524-25 (1964). Moreover, delayed refunds may not totally compensate customers for the actual cost of money later refunded, and delay diminishes the possibility that those who payed these excessive rates would be those who ultimately receive the refunds. *F.P.C.* v. *Tennessee Gas Co.*, 371 U.S. 145, 154 (1962). The *Tennessee Gas* case held, citing *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 388 (1959), *prompt* refunds were required "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges."

Jersey Central argues that its customers will not be harmed because they will eventually get the refunds. Yet Jersey Central believes that it will be subject to irreparable injury if it now has to make refunds that are subject to later recovery by Jersey Central if it prevails on appeal. As *Virginia Jobbers*, *supra* at 925 states:

> Relief saving one claimant from irreparable injury, *at the expense of similar harm caused another*, might not qualify as the equitable judgment that a stay represents (emphasis supplied).

We believe that in proceedings such as this the public interest supports the rapid disbursement of refunds ordered by the Commission. The authority given to the Commission to determine the justness and reasonableness of rates is for the protection of the public interest as distinguished from the private interests of utility companies. *F.P.C.* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1156). In protecting the consumer, the Commission's primary mission is to assure the lowest possible reasonable rates consistent with the maintenance of adequate service. *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591, 611 (1941). The Commission's orders in this proceeding do this.

In *Holiday Tours, supra*, the court modified one part of the *Virginia Jobbers* test. It eased the standard for determining whether a petitioner has made a strong showing that it is likely to prevail on the merits of an appeal. In order for a petitioner to come within the ambit of this modified test, it must show that the other three factors strongly favor a granting of a stay.[5] In the instant proceeding Jersey Central has not made such a showing sufficient to warrant a stay.

**The Commission finds:**

The Motion of Jersey Central Power & Light Company For Stay Pending Judicial Review filed January 5, 1978, should be denied.

**The Commission orders:**

The Motion of Jersey Central Power & Light Company For Stay Pending Judicial Review filed January 5, 1978, is hereby denied.

By the Commission.

( S E A L )

LOIS D. CASHELL,
Acting Secretary.

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[5] *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841 at 843.



**APPENDIX I**

# United States Court of Appeals

FOR THE THIRD CIRCUIT

| | |
|---|---|
| JERSEY CENTRAL POWER & LIGHT COMPANY, *Petitioner*, v. FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*, ALLEGHENY ELECTRIC COOPERATIVE, INC., *Intervenor*, BOROUGHS OF MADISON, BUTLER, LAVALLETTE, AND SEASIDE HEIGHTS, NEW JERSEY, *Intervenor*. | No. 78-1185 |

**PETITION OF JERSEY CENTRAL POWER & LIGHT COMPANY FOR REHEARING**

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December 21, 1978

# United States Court of Appeals

FOR THE THIRD CIRCUIT

JERSEY CENTRAL POWER AND LIGHT COMPANY
*Petitioner,*
v.
FEDERAL ENERGY REGULATORY COMMISSION
*Respondent,*

No. 78-1185

## PETITION OF JERSEY CENTRAL POWER & LIGHT COMPANY FOR REHEARING

### I. INTRODUCTION

Jersey Central Power & Light Company ("Jersey Central") hereby applies for rehearing of this Court's judgment in the above captioned proceeding entered on December 8, 1978, affirming the decision below of the Federal Energy Regulatory Commission ("the Commission"). Jersey Central believes that the Court misapprehended the legal basis upon which the Commission acted. As a result, the Court (1) failed to address the question, whether the phase-in at issue here constitutes a proscribed form of retroactive ratemaking; and (2) apparently affirmed a decision which the Commission did not make—the justness and reasonableness of the phase-in.

Jersey Central's position is that (1) even if the Court's interpretation of Jersey Central's superseded fuel clause is correct, this tariff interpretation does not compel the conclusion that the phase-in constitutes retroactive ratemaking; and (2) the Commission should be required to address the justness and reasonableness of the phase-in.



### II. ARGUMENT

In its December 8, 1978 opinion this Court agreed with the Commission's implicit interpretation of Jersey Central's superseded fuel clause.[1] The Court found that the Commission had properly interpreted that clause as one imposing a "current" charge for fuel costs based upon use of past costs as a "proxy" or "estimate" for current month costs. Jersey Central will not dispute this interpretation for purposes of this application for rehearing. What Jersey Central does dispute, however, is that this interpretation of its tariff necessarily compels the result reached below.

This Court has not analyzed the question of why the foregoing tariff interpretation requires rejection of the phase-in. Rather, the Court simply concluded:

> "... it appears to us that the Commission is on solid ground in concluding that a reasonable interpretation of the tariff compels the result it reached" (Opinion p. 7).

What the Court apparently misapprehended is that the Commission's decision below is based upon a two-step process:

> 1) The conclusion that Jersey Central's superseded fuel clause operated to recover current charges based upon the "proxy" principle; and
>
> 2) The legal conclusion that because of this interpretation, the phase-in would constitute a form of illegal retroactive ratemaking which the Commission is powerless to approve.

It is the second step of this process which the Court has not addressed.

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[1] The Commission never did offer its interpretation of Jersey Central's superseded fuel clause.

**A. Even if the proxy theory is correct, the phase-in does not constitute retroactive ratemaking.**

In support of its legal conclusion that the phase-in would constitute retroactive ratemaking, the Commission reasons that the phase-in is designed to recover monies spent in the *past*, prior to the effective date of the phase-in; thus, it must constitute a form of illegal retroactive ratemaking.

The Commission's reasoning is faulty in that it fails to take account of the traditional accrual accounting concept as it applies in the ratemaking context. Recovery of cash expenditures, properly recognized as "expenses" in a period different from the period in which the actual cash is expended, is a fundamental and appropriate tenet of both accounting *and* ratemaking.

Whatever interpretation is given to Jersey Central's superseded tariff, it cannot be disputed that the dollars which the phase-in seeks to recover are dollars which are properly recorded as "expenses" during the effective period of the phase-in. The phase-in does not seek to recover "expenses" which are allocated to a period prior to the effective period of the phase-in despite the fact that the dollars were actually spent in a period prior to the effective period of the phase-in. This aspect of the accrual accounting is true with respect to the phase-in as it is true with respect to numerous other traditional ratemaking items. Jersey Central has presented several examples of this tenet in its brief and will not belabor the point here.[2]

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[2] We would only note that the point is particularly true with respect to fuel cost accounting. Even in the absence of deferred fuel cost accounting, the amount of fuel "expensed" each month is based on fuel *consumed*. Cash spent on fuel purchases each month may be quite different from fuel consumed.



**B. The Commission Should Be Required to Consider the Justness and Reasonableness of the Phase-In.**

The Court's opinion touches upon considerations pertinent to the question of whether the proposed phase-in is just and reasonable—the critical question which the Commission never reached. Thus, the Court has apparently found that any fuel adjustment charge of a relatively inexact nature (e.g. one tied to wholesale price index) but which has "...some reasonable relationship to energy costs incurred during a billable month" may be a just and reasonable charge (Opinion p. 5). Jersey Central does not dispute the implications of the Court's comments. Rather, we think that the *Commission* should be called upon to consider whether this reasonable relationship between energy costs incurred and revenues collected must necessarily be that of a precise month-to-month matching relationship.

As this Court itself has noted, wide fluctuations in both energy usage and in actual fuel prices make it impossible to have anything approaching a precise matching of costs incurred in any *particular* month and revenues recovered in that very same month.[3] Rather the entire essence of proxy fuel clauses based upon either one month, or several months, or as much as a year of past data (*See Maine Public Service Company* v. *FERC*, 1st Cir. No. 77-1438, decided June 26, 1978) is that *over a reasonable time period* they do effect a precise matching of fuel costs with fuel revenues collected from customers.

This Court has stated that:

> "Thus, in no way has the Commission nor have we passed on the question of whether the clause interpreted as a current charge based on past data is just and reasonable."

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[3] This fact of life is relevant to the weight to be given to the plea that customers entering and leaving the system may be treated unfairly—a problem which exists with equal force whether or not a surcharge or phase-in is at issue.

Jersey Central seeks only to have the Commission actually consider the question of whether its new fuel clause, *including the phase-in aspect of that clause*, interpreted as a "current" charge based on past data will be just and reasonable by effecting, over a reasonable time period, a matching of fuel costs with fuel revenues collected from customers. This Court should require the Commission to address this question.

## III. CONCLUSION

Wherefore the instant application for rehearing should be granted and this proceeding should be remanded to the Commission with directions to determine whether Jersey Central's new fuel clause, including the phase-in aspect of that fuel clause, meets the just and reasonable standard of the Federal Power Act.

Respectfully submitted,

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December 21, 1978



## APPENDIX J

SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States. [16 U.S.C. § 824(a)].

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter. [16 U.S.C. § 824(b)].

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States. [16 U.S.C. § 824(c)].

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale. [16 U.S.C. § 824(d)].

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns

or operates facilities subject to the jurisdiction of the Commission under this Part. [16 U.S.C. § 824(e)].

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a state, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto. [16 U.S.C. § 824(f)].

SECTION 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful. [16 U.S.C. § 824d(a)].

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of [16 U.S.C. § 824d(b)].

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services. [16 U.S.C. § 824d(c)].



(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published. [16 U.S.C. § 824d(d)].

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested

public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [16 U.S.C. § 824d(e)].

SECTION. 313 (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any orders of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this act. [16 U.S.C. § 825*l*(a)].

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such



proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in Section 2112 of Title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were unreasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the

Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended (U.S.C., Title 28, Secs. 346 and 347). [16 U.S.C. § 825*l*(b)].

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [16 U.S.C. § 825*l*(c)].

**§ 1254. Courts of appeals; certiorari; appeal; certified questions**

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnent to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. [28 U.S.C. § 1254.]



## APPENDIX K

**§ 35.22 Research and development clauses.**

(a) Advance Commission approval may be requested of rate treatment for RD&D expenditures of $50,000 or more related to a project undertaken (by the company or as part of a project undertaken by others, or for a group of projects) which, in the aggregate, cost $50,000 or more. This approval may be requested regardless of whether the RD&D is undertaken by the utility or by another party or organization. Approval requests shall describe the project in such detail as to satisfy the Commission that the project expenditure involved qualifies as being valid, justifiable, and reasonable. In addition, the request shall specifically include the estimated cost of the project and a description of the utility's expenditure percentage in the total project program. When a utility participates in a joint project, the contractual agreements should provide the utility complete access to cost records and results related to the project. Records shall be kept so that unscheduled progress reports may be called for as determined by the Commission. Approval requests shall justify any conduct of or partial support of large scale demonstration facilities by clearly identifying and justifying the portions of the capital and operating costs which require the high-risk financial support necessary to the pursuit of RD&D. The justification of support for a large-scale demonstration facility shall include a statement as to the planned accounting treatment of revenue which may be derived from the facility's product and of proceeds which may be derived from the sale of the facility.

(b) Where more than one jurisdictional company proposes to support an RD&D organization as defined below, an approval request may be submitted to the Commission by the RD&D organization covering the organization's RD&D program as defined below. Approval by the Commission of such RD&D program shall constitute approval of individual companies' contributions to the RD&D organization. Organizations eligible to receive con-

tributions from companies and to request program approval from the Commission under this section may be RD&D organizations broadly supported by a number of energy industry sectors (e.g., natural gas, electric power, petroleum, coal, nuclear energy); RD&D organizations broadly supported by a single industry sector; regional organizations that work primarily on problems of a regional nature; or consortia of companies that jointly support RD&D programs for the collective benefit of their ratepayers.

(c) RD&D organizations or individual jurisdictional companies requesting and receiving advance RD&D program approval shall annually submit a five-year program plan at least 180 days prior to the commencement of the five-year period of the plan. The plan shall clearly state the objectives within and beyond the five-year period and clearly relate the objectives to the interests of the ratepayers, the public and the industry and to the objectives of other major research organizations, particularly the U.S. Energy Research and Development Administration. The plan shall contain sufficient budget, technical, and schedule details to afford an understanding of the work to be performed, to allow an assessment of the probability of success, and to permit comparison with other organizations' research plans. The commencement date and expected termination date for individual research development and demonstration projects to be initiated during the first year of the plan will be given along with expected annual costs. The plan shall discuss the RD&D efforts and progress since the preparation of the program plan submitted the previous year and shall explain any changes that have been made in objectives, priorities, and budgets since the plan of the previous year. The plan shall identify all jurisdictional companies that will support the program and their budgeted support. The plan shall identify those persons involved in the development, review, and approval of the plan and shall state the amount of effort contributed and the degree of control exercised by each. The principal tests for the adequacy of the proposed plan shall be the following guidelines:



(1) Evidence that the RD&D objectives of the company or research organizations have been clearly established.

(2) Evidence that the plan evolves from these RD&D objectives and adequately utilizes the viewpoints of scientific engineering, industry, economic, consumers and environmental interests.

(3) Evidence that an effective mechanism exists and is used for coordinating this research and development plan with other relevant efforts of national scope.

(4) Evidence that the project or program is well conceived and, if successful, has a reasonable chance of benefitting the ratepayer in a reasonable period of time, having due regard to the basic, exploratory or applied nature of each submitted RD&D project.

Evidence that whatever achievements may result, including knowledge gained or technology developed from the RD&D effort, if any, will accrue to the benefit of the sponsoring jurisdictional company(s) and its/their customers.

(d) Within 90 days of filing of the five-year RD&D plan as defined above, the Commission will state its decision with respect to acceptance, partial acceptance, or rejection of the plan, or, when the complexity of issues in the plan so requires, will set a date certain by which a final decision will be made, or will order the matter set for hearing. Partial rejection of a plan by the Commission will be accompanied by a decision as to the partial level of acceptance which will be proportionally applied to all contributions listed for jurisdictional companies in the plan. Approval by the Commission of a five-year plan constitutes approval for rate treatment of all projects identified as starting during the first year of the approved plan. Continued rate treatment will be dependent upon review and evaluation of subsequent annual reports.

(e) An electric utility may submit a research, development and demonstration cost adjustment provision to flow through changes in its expenditures for research,

development and demonstration. Changes permitted hereunder include both expenditures chargeable to operations as well as rate base treatment of the balances in Account 188 as hereinafter defined. Except in the case of expenditures approved pursuant to §35.22(b), no RD&D adjustment provision shall become effective until authorized by the Commission. No request for an RD&D adjustment provision will be considered by the Commission unless the proposed clause indicates the following terms and conditions:

(1) The RD&D expenditure adjustment shall be reflected in the company's rates only when it amounts to at least $0.00001 per kWh of annual sales. Rate changes shall be applied to the energy component of the existing rates.

(2) Rate changes shall be computed and filed semi-annually.

(3) RD&D expenditures chargeable to operations which may be tracked and reflected in rates shall be the amount which actual RD&D expenditures during the 12-month period ending 3 months prior to a proposed rate adjustment exceed or are less than (i) the amount allowed in the company's last rate proceeding, or the average of 3 years RD&D expenditures if such rate adjustment is an initial filing under this subsection; or (ii) the actual RD&D expenditures in the company's last prior rate adjustment under this subsection.

(4) RD&D expenditures chargeable to Account 188 which are eligible to receive rate base treatment and which may be tracked and reflected in rates shall be the amount which the actual balances in such account during the 12-month period ending 3 months prior to the proposed rate adjustment exceed or are less than the balances in such account as of the date of this regulation if an initial filing under this subparagraph, or the balances in Account 188 included in the company's last prior rate adjustment under this subparagraph. For purposes of determining the balance which may be tracked, the company shall reduce the balance in Account 188 by all money



received related to its RD&D expenditures and shall increase or reduce such account balance, as appropriate, by the applicable accumulated deferred income taxes. The rate of return used by the company to determine the rate effect of the rate base treatment of the balance in Account 188 shall be the rate of return last allowed by the Commission for this class of service during the previous 3-year period. If there has been no such rate of return allowed then, in absence of evidence submitted to the contrary, the return utilized shall be the present interest rate used for computing refunds as specified in §35.19a of the Commission's regulations under the Federal Power Act.

(5) Any rate schedule filing made by the company to increase its rates to its customers shall meet the notice requirements of §35.3 of the regulations which provide, in pertinent part, that the filing be filed with the Commission and posted (as defined in §35.2(d) of the regulations) at least 30 days prior to the date on which any change(s) in its existing rates is to become effective. Simultaneously with the above filing, the company shall furnish the Commission, jurisdictional customers, and interested State commissions a report containing detailed computations which clearly show the derivation of the proposed rate adjustment. The effect upon jurisdictional rates shall be determined by computing the unit change (either increase or decrease) based upon sales for the 12-month period ending 3 months prior to the proposed rate adjustment. Any RD&D expenditures for which the company has been allowed to track by other regulatory bodies shall be clearly designated and treated in such a manner so as to avoid double recovery. Each rate adjustment shall become effective on the proposed effective date without suspension provided that any rate increase shall be subject to reduction and refund of any portion found after hearing to be unjustified by a final and nonappealable Commission order. The filing fee requirements of §36.2 of the regulations are hereby waived and shall not apply to any filings made under this section (§35.22).

(6) In addition to the above-required report containing the derivation of the proposed rate, the following additional data shall be submitted as part of the application:

A statement as to the anticipated scope and objective of the RD&D and the relationship of such objective to the jurisdictional service for which the tracking is to apply. If the tracking is not to apply to certain jurisdictional service but is to apply to others, a statement as to the reasons for such determination.

(7) No company shall be required to reduce its rates under this subparagraph by an increment exceeding the aggregate increases allowed thereunder.

Supreme Court, U. S.
FILED
JUL 27 1979
MICHAEL RODAK, JR., CLERK

No. 78-1665

# In the Supreme Court of the United States

OCTOBER TERM, 1978

JERSEY CENTRAL POWER & LIGHT COMPANY, PETITIONER

*v.*

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 589 F. 2d 142. The orders of the Commission (Pet. App. D-H) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on December 8, 1978. An order denying a petition for rehearing was entered on February 2, 1979 (Pet. App. B). The petition for a writ of certiorari was filed on May 3, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission[1] properly rejected portions of a wholesale electric tariff proposing to phase-in an increase in the factor representing the base period cost of fuel in the tariff's automatic fuel adjustment clause.

## STATUTE INVOLVED

Pertinent provisions of Part II of the Federal Power Act, ch. 687, 49 Stat. 847-854, 16 U.S.C. 824-824h, are set forth in Appendix I of the petition (Pet. App. 43a-46a).

## STATEMENT

1. Most rates for electric service to a customer consist of two elements: a "demand charge" to recover the relatively fixed, capacity-related costs of supplying power; and an "energy charge", to recover the variable costs of supplying electric energy— primarily the cost of fuel used to produce the kilowatt-hours supplied.[2] The estimated average cost of fuel at the time the rate is established— known as the base period cost of fuel—is recovered in the energy rate. Actual fuel costs, however, vary from this fixed base period cost.

The Commission has long allowed wholesale electric utilities to include in their tariffs automatic fuel cost adjustment clauses to reflect the utilities' changing fuel

[1]The FERC succeeded to the relevant responsibilities of the former Federal Power Commission over wholesale electric rates effective October 1, 1978. Section 402(a)(1)(B), Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 584 (to be codified as 42 U.S.C. 7172(a)(1)(B)). Hereinafter, "Commission" refers to the FERC or the FPC depending on whether the events described occurred before or after October 1, 1978.

[2]See *Public Service Company of New Hampshire* v. *FERC*, No. 77-1592 (D.C. Cir. May 3, 1979).



costs.[3] 18 C.F.R. 35.14. Such clauses relieve utilities from the burden of continually filing rate changes as fuel costs fluctuate. The regulation permits utilities to adopt formulas for calculating the difference between the cost of fuel in a base period and the "current" cost of fuel. Under such a formula, a utility may recover any excess of current costs over base period costs as an added charge for the billing period. Thus, the energy rate's recovery of the base period fuel cost, and the fuel adjustment clause's recovery of actual costs in excess of the base, operate, in a properly designed tariff, to collect all fuel costs actually incurred by the utility in supplying power during a given month.

2. Petitioner, Jersey Central Power & Light Company, is a public utility selling electricity at wholesale in interstate commerce under Section 201(e), Part II, Federal Power Act, ch. 687, 49 Stat. 848, 16 U.S.C. 824(e).

In 1973, Jersey Central filed a tariff with a fuel adjustment clause (App., *infra*, 1a) that became effective December 2, 1973 (R. 305).[3] The clause provided that a fuel cost adjustment, determined "to the nearest one-thousandth of 1 mill per kilowatt-hour in accordance with the formula set forth below, shall be applied to all kilowatt-hours supplied during the billing month" (App., *infra*, 1a). The formula listed various factors, including a predetermined base period fuel cost per kilowatt-hour (as modified)[4] of 5.659 mills, and factors for actual fuel costs, kilowatt-hours generated, and sales thereof in the

[3]"R." refers to the certified record in the court of appeals.

[4]The originally effective clause (App., *infra*, 1a) applied only to fossil fuel. It was modified, effective August 4, 1975, to reflect the cost of nuclear fuel as well. FPC Electric Tariff, Jersey Central Power & Light Company, Original Volume No. 1, Second Revised Tariff Sheet No. 15.

"current" period (App., *infra*, 1a). It also provided that the latter three factors were "to be determined as the three month totals for the period ending with the second calendar month preceding that billing month" (*id.* at 2a). Thus, for example, under the formula, bills for kilowatt-hours supplied in June contained an adjustment based on fuel costs actually incurred in a prior period: January, February and March.

In July 1976, Jersey Central filed a tariff with the Commission proposing to raise the base period cost of fuel from the amount set forth in its 1973 tariff to a new level reflecting 1976 costs (14.433 mills per kwh). The new tariff became effective on September 27, 1976, subject to refund. Jersey Central also proposed to change its adjustment clause in two respects (App., *infra*, 3a): by commensurately raising the base period fuel cost factor used in the adjustment formula; and by phasing-in this increase in a series of steps over a five-month period after the new clause became effective.[5] The effect of the phase-in mechanism would have been to permit Jersey Central, in the first four months of the new tariff, to charge rates reflecting costs higher than those that would be otherwise attributable to those months. It is the lawfulness of the phase-in mechanism that is at issue in this case.

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[5]The phase-in was expressed as follows (App., *infra*, 4a):

| $\frac{Fb}{Sb}$ = Base fuel cost: | | mills |
|---|---|---|
| | For the first month of effectiveness of this clause | 5.659 |
| | For the second month of effectiveness of this clause | 5.659 |
| | For the third month of effectiveness of this clause | 8.584 |
| | For the fourth month of effectiveness of this clause | 11.508 |
| | All succeeding months | 14.433 |



Jersey Central claimed that the phase-in mechanism was calculated and designed to permit it to recover fuel costs actually incurred in July and August 1976. It contended that, without the phase-in mechanism, recovery of those costs would be lost because they could not be recovered under the 1973 tariff (which would apply to the billing for power delivered in those months) in view of the provision in the adjustment clause of the 1973 tariff providing that cost factors in the adjustment formula were to be based on costs "for the period ending with the second calendar month preceding the billing month" (*i.e.*, May and June). It analogized the phase-in mechanism to a surcharge proposal that had been filed with the Commission by the Public Service Company of New Hampshire (FPC Docket No. ER 76-285). Jersey Central argued that this surcharge was permissible because the 1973 fuel adjustment clause was intended to defer the recovery of the costs incurred in the current billing month to later months, and claimed that the phase-in device simply permitted the recovery of deferred costs that would have been recoverable under the 1973 tariff (R. 566).

Jersey Central's wholesale customers protested that the utility was mischaracterizing its prior fuel clause. In their view, that clause had never recovered actual fuel costs on a deferred basis and was not designed to do so, but had simply used past fuel costs as "test period" costs that reasonably approximated current fuel costs for purposes of calculating the fuel adjustment charge. In other words, in the customers' view, the 1973 tariff was designed to recover costs of the current billing month in the charges for the power delivered in that month. Thus, the costs for July and August 1976 were recovered in the billings for those months, which were governed by the 1973 tariff; they could not also be recovered in a subsequent tariff. To do so would constitute prohibited retroactive ratemaking.

even if, as Jersey Central claimed, the design of the 1973 tariff fell short of recovering the full actual costs of the period to which that tariff applied. Moreover, the Jersey Central customers contended that the phase-in mechanism operated to recover more than the 1973 fuel clause (or the 1976 fuel clause without the phase-in) would have recovered in any event, and thus would constitute a patent overcollection that would be unjust and unreasonable (R. 421-422, 438-443).[6]

3. Before a hearing on Jersey Central's phase-in proposal was held,[7] the Commission issued Opinion No. 790, disapproving the surcharge proposal by the Public

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[6]The customers' overcollection claim was based on the fact that during the first four months of the phase-in period, the base period fuel cost recovered by the energy charge was higher then the base period factor used in the adjustment formula to calculate the difference between current and base period costs.

As we have stated, under both tariffs, the energy charge [EC] recovers the base period fuel cost (Fb) plus (or minus, in periods of declining fuel costs) an adjustment (A). In periods of rising fuel costs, A equals current fuel costs (Fc) minus Fb. Fb under the old tariff was approximately 5 mills per kilowatt. Fc for September 1976 was approximately 15 mills. Fb under the new tariff was also approximately 15 mills, except that under the phase-in for September 1976, it was to be 5 mills.

As applied to a typical wholesale customer, if the old tariff had remained in force for September 1976, the energy charge for that month would have recovered 5 mills plus an adjustment(15 minus 5 mills), or 15 mills—*i.e.*, the current fuel cost for that month. Under the new tariff and its phase-in mechanism, the energy charge for September 1976 would have recovered 15 mills plus an adjustment (15 minus 5 mills), or 25 mills—a charge far in excess of the costs for that month and not justified by any need to recover that which would have been recovered under the old tariff in that month (see R. 438-443).

[7]The proposed phase-in was suspended and set for hearing by Commission order issued August 26, 1977 in Docket No. ER76-813 (Pet. App. 11a-14a). It became effective, subject to refund, under Section 205(e) of the Federal Power Act, 16 U.S.C. 824d(e).



Service Company of New Hampshire (PSNH) which Jersey Central had claimed was similar to its own and on which it had relied.[8] The Commission found that PSNH's prior fuel clause was not designed to collect past fuel costs on a deferred basis; rather, the clause used the fuel costs incurred in the designated three month period preceding the billing month as "test period" costs to determine "current" fuel costs and adjustment charges. Therefore, it held, there were no "deferred" fuel costs still owed under the old fuel clause that could properly be collected by means of the new surcharge. The Commission concluded that allowing the surcharge would amount to authorizing recovery of prior costs not provided for in the old fuel clause. This would have constituted retroactive ratemaking which, the Commission held, is not authorized by the Federal Power Act.

The Commission found that Jersey Central's old fuel clause, like that of PSNH, used past months' fuel costs as "test period" costs for computing current fuel adjustment charges. On the basis of Opinion No. 790, therefore, the Commission summarily rejected Jersey Central's phase-in proposal (Pet. App. 22a-26a, 27a-30a). The Commission did not reach the further contention of Jersey Central's customers that the operation of the tariffs without the phase-in provision would not in fact prevent Jersey Central from recovering all its costs, and that the phase-in provision would simply result in a patent overcollection.

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[8]*Public Service Company of New Hampshire*, 19 P.U.R 4th 210 (FPC 1977), rehearing denied, Opinion No. 790-A, Docket No. ER76-285 (May 20, 1977), aff'd, *Public Service Company of New Hampshire* v. *FERC*, No. 77-1592 (D.C. Cir. May 3, 1979), rehearing denied, July 3, 1979.

4. The court of appeals affirmed (Pet. App. A). It held that the Commission had properly construed the prior tariff as simply providing a method to calculate a current charge in the billing month on the basis of a specific formula applied to kilowatt-hours delivered in that month. That the formula was based on costs in a preceding period did not amount to a provision for recovery of "deferred" fuel costs actually incurred (Pet. App. 6a-7a). The court noted that the Fourth Circuit in *Virginia Electric and Power Co.* v. *FERC*, 580 F. 2d 710 (1978), had taken the same approach, but that the First Circuit in *Maine Public Service Co.* v. *FPC*, 579 F. 2d 659 (1978), had remanded on the ground the Commission had misapplied the principles of *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951).

The court distinguished *Maine Public Service*, stating that "[r]egardless of whether *Montana-Dakota* forecloses the phase-in here, it appears to us that the Commission is on solid ground in concluding that a reasonable interpretation of the tariff compels the result it reached". (Pet. App. 8a).

**ARGUMENT**

The decision of the Commission and the court of appeals presents a narrow issue arising from the design of the particular fuel cost adjustment clause involved. Although one circuit has remanded the Commission's rejection of a surcharge designed to recover costs incurred under a prior tariff (see pages 12-14, *infra*), the question turns in each case upon the terms and intent of particular tariff provisions. Moreover, it appears unlikely that the issue presented here will recur in a form requiring resolution of the conflict by this Court. Further review in this case is therefore unwarranted.



1. The Commission has recently considered a series of cases concerning changes by wholesale utilities in automatic fuel cost adjustment clauses; each of these cases has been reviewed by the courts of appeals.[9] They involve disputes over the transition from an old provision to a new one. In each case, the utility proposed to collect, under the new clause, costs incurred while the old clause was in effect, which the utility claimed would otherwise not be collectable because the old clause was superseded. The Commission ruled that utilities can charge only rates currently on file with it, and cannot retroactively recover costs not covered by those tariffs. The issue in each case has turned, therefore, on the language of the superseded tariff provisions involved.

In this case, as noted (page 5, *supra*) Jersey Central's phase-in mechanism was designed to collect under the new tariff fuel costs incurred in July and August 1976, when the old tariff was in effect. Jersey Central claimed that this was necessary because those costs would otherwise be lost in view of the two-month lag in the old adjustment clause and in view of the transition to the new tariff (but see page 6 & note 6, *supra*). Jersey Central claimed that this was permissible because, it argued, the old adjustment clause was designed simply to defer the recovery of costs incurred in a given month until two months later.

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[9] *Public Service Company of New Hampshire*, FPC Docket No. ER76-285; *Pennsylvania Electric Company*, No. ER76-607; *Metropolitan Edison Company*, Nos. ER76-209 and ER76-492, aff'd. *Public Service Company of New Hampshire* v. *FERC*, No. 77-1592 (D.C. Cir. May 3, 1979), rehearing denied, July 3, 1979; *Appalachian Power Company*, Nos. ER77-325 and ER77-426, remanded. *Public Service Company of New Hampshire*, *supra*; *Virginia Electric and Power Co.*, No. ER76-415, aff'd, *Virginia Electric and Power Co.* v. *FERC*, 580 F. 2d 710 (4th Cir. 1978); *Maine Public Service Co.*, No. E-8264, remanded, *Maine Public Service Co.* v. *FPC*, 579 F. 2d 659 (1st Cir. 1978); and the instant case, *Jersey Central Power & Light Company*, No. ER76-813, aff'd, *Jersey Central Power & Light Company* v. *FERC*, 589 F. 2d 142 (3d Cir. 1978).

The issue thus considered by the Commission and the court of appeals was whether the 1973 clause, which had been designed by Jersey Central itself,[10] provided for recovery on a deferred basis of fuel costs actually incurred; or simply provided a formula, based on past costs in a specified period, that determined the fuel adjustment applicable to kilowatt-hours supplied during the current billing month.

The Commission expressly held "that Jersey Central intended its fuel adjustment clause to recover costs for a given month based on costs incurred during a prior test period" (Pet. App. 29a).[11] The court of appeals agreed that the tariff compelled the result the Commission reached (Pet. App. 8a).[12] As the court explained (Pet. App. 7a):

> We think it significant that the tariff stated that the adjustment should be determined "in accordance with the formula set forth," an approach inconsistent with the company's argument that an assessment of actual cost was intended. The tariff provided unmistakably that the charge in the billable month was to be computed on the basis of a specific formula. There was no provision for a charge other than the monthly rate computed under the formula and

[10]As the court of appeals noted, "any doubt as to the meaning [of the tariff] should be resolved against the filing utility. *Cf. United States* v. *Missouri-Kansas-Texas Railroad*, 194 F. 2d 777 (5th Cir. 1952). *See also Great Northern Railway* v. *Merchants Elevator Co.*, 259 U.S. 285, 290-91" (1922) (Pet. App. 6a).

[11]The Commission found strong evidence of this intent in Jersey Central's initiation of the clause in 1973. It "collected for the first month, based on cost incurred during the prior three month period, before the fuel clause took effect" (Pet. App. 29a).

[12]Petitioner's claim (Pet. 9-10) that the court of appeals supplied a rationale not adopted by the Commission is thus patently incorrect.



> applied to the kilowatt-hours in the billable month. The fact that the formula was based on costs in a preceding period did not change its effect of providing a method to calculate a current charge rather than to exact a precise recovery of past expenses. Such a formula could as well have been based, for example, on some past wholesale price index or similar factor rather than actual cost incurred, and yet be the basis for a "current" charge.

2. Although the court of appeals' decision turns on the language of Jersey Central's 1973 tariff, its decision affirming the Commission's rejection of the phase-in proposal in the superseding fuel clause necessarily rests on the rule against retroactive ratemaking, and the related doctrine that a utility may charge only those rates set forth in tariffs on file with the Commission. The underlying rationale of the Commission's decision was that if a utility designs its tariffs so as to recover costs for a given period, but its tariff fails fully to recover the costs actually incurred, it may not retroactively recoup those costs in a subsequent tariff.[13] The principle is well established under the Federal Power Act and its analogue, the Natural Gas Act. See, *e.g.*, *FPC* v. *Tennessee Gas Co.*, 371 U.S. 145, 152-153 (1962); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944); cf. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 254 (1951). See *Public Service Company of New*

[13]*Public Service Company of New Hampshire, supra*, note 8.

*Hampshire* v. *FERC*, No. 77-1592 (May 3, 1979), slip op. 26-28.[14]

As applied to transitions from one fuel adjustment clause to another, this rationale involves a conflict among the circuits. In *Maine Public Service Co.* v. *FPC*, *supra*, the First Circuit held that the filed-rate doctrine and the rule against retroactive ratemaking did not of themselves prevent recovery through a current fuel cost adjustment clause of the fuel costs actually incurred before the current clause became effective. It described such clauses as "unique animals that are not not easily assimilated to classical rate-making principles" (579 F. 2d at 668). It therefore remanded a Commission decision rejecting, as retroactive ratemaking, a utility's fuel cost surcharge; the court directed the Commission to determine whether the surcharge was just and reasonable without regard to supposed restrictions against retroactive rates.[15]

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[14]As the Court observed in *FPC* v. *Sierra-Pacific Power Co.*, 350 U.S. 348, 355 (1956):

> [W]hile it may be that the Commission may not normally *impose* upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain.

[15]*Maine Public Service Co.*, *supra*, involved a utility's transition from a fuel adjustment clause based on the average of fuel costs over the twelve months preceding the billing month to a clause recovering fuel costs incurred in the previous month. Due to rapidly rising fuel prices, the old "average" formula allegedly failed to recover fuel costs for the twelve-month period actually preceding the change-over. The utility proposed a surcharge to be imposed during the next twelve months which was intended to recover the difference between actual fuel costs incurred in the previous period, and the fuel costs billed under the old formula. The Commission held that the surcharge constituted retroactive ratemaking. See note 9, *supra*, page 9.



The Fourth Circuit's decision in *Virginia Electric and Power Co.* v. *FERC*, 580 F. 2d 710 (1978), and the District of Columbia Circuit's recent decision in *Public Service Company of New Hampshire* v. *FERC*, *supra*, are to the contrary.[16]

The conflict, however, does not appear to be significant in the context of these cases. All of the decisions turn on problems of transition from one form of fuel cost adjustment clause to another and on the language and intent of particular tariff provisions. The First Circuit has not generally questioned the prohibition against retroactive ratemaking; rather, it has held that the principle does not apply to fuel cost adjustment clauses. We believe this analysis incorrect for the reasons we have stated, and which perhaps have been most thoroughly considered and articulated by the D.C. Circuit in *Public Service Company of New Hampshire*, *supra*. Moreover, we believe the question presented by these cases, which stem from problems associated with transitions from one type of adjustment clause to another, is unlikely to recur. Utilities are much more experienced and sophisticated in

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[16] *Virginia Electric and Power supra*, involved a transition from a fuel adjustment clause permitting collection of fuel costs on a three-month basis with a two-month lag, to a monthly adjustment factor based on fuel costs for the second month preceding the billing month, with a subsequent adjustment for any differences between actual fuel costs and the monthly adjustment factor. In addition, the utility sought to impose a surcharge to be collected over 24 months in order to recapture actual fuel costs incurred during the prior billing period.

*Public Service Company of New Hampshire*, *supra*, involved five Commission decisions rejecting similar surcharges. See note 8, *supra*, page 7. The *Virginia Electric and Power* decision notes but does not discuss the First Circuit's ruling. *Public Service Company of New Hampshire* fully explains the reasons for its disagreement with the First Circuit, holding that the rule against retroactive ratemaking applies with the same force to fuel cost adjustment clauses in tariffs as it does to other rate provisions. Slip op. 25-36.

designing fuel cost adjustment clauses than they were when such provisions were first introduced. They have learned to write their clauses in the expectation that fuel costs will continue to rise, and to design them so that they more closely and contemporaneously match revenues recovered to the rising fuel costs actually incurred (see, *e.g.*, note 16, *supra*, page 13). The decisions of the District of Columbia, Third and Fourth Circuits provide an additional incentive for them to pursue this careful course. Thus, while there may be some further litigation over the transition issue, its significance to administration of the Federal Power Act appears to be limited.

Subsequent experience may prove our assessment in this respect to be erroneous. Automatic adjustment clauses, which permit the passing on to consumers of costs without a preliminary review by regulatory agencies involve substantial public interest and concern. See, *e.g.*, Section 115(e) of the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3126.[17] Nevertheless, the instant case does not now appear to present any issue arising under the Federal Power Act as applied to these clauses that merits the Court's urgent attention.

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[17]Two state supreme courts construing state public utility statutes that do not permit retroactive ratemaking have reached conflicting results with respect to fuel cost adjustment clauses. Compare *State of North Carolina ex. rel. Utilities Commission and Duke Power Company* v. *Edminsten*, 291 N.C. 451, 232 S.E. 2d 184 (1977), with *Southern California Edison Co.* v. *Public Utilities Commission*, 20 Cal. 3d 813, 576 P. 2d 945, 144 Cal. Rptr. 905 (1978).



## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1979

DOJ-1979-07

**APPENDIX**

Jersey Central Power & Light Company
FPC Electric Tariff
Original Volume No. 1

First Revised Sheet No. 15
Superseding Original
Sheet No. 15

**ACCEPTED FOR FILING**
**TO BECOME EFFECTIVE**
**12-2-73**

## RESALE POWER SERVICE FOSSIL FUEL COST ADJUSTMENT CLAUSE

A fossil fuel cost adjustment factor shall be applied to each kilowatt-hour supplied under this tariff. This fuel cost adjustment determined to the nearest one-thousandth of 1 mill per kilowatt-hour in accordance with the formula set forth below, shall be applied to all kilowatt-hours supplied during the billing month.

$$A = \left(\frac{Fc}{Gc} - \frac{Fb}{Gb}\right) \times Gc \times Sc \times \frac{1}{1 - T}$$

Where A = Adjustment factor in mills per kilowatt-hour to be supplied to each kilowatt-hour applied under this tariff.

F = The cost of fossil fuel determined as the sum of Accounts 501 and 547 (less handling costs) in the current (c) and base (b) periods.

G = Net kWh generation by fossil fuels in the current (c) and base (b) periods.

S = Sales shall be all kWh's sold excluding inter-system sales in the current (c) period.





$\frac{Fb}{Gb}$ = Base fossil fuel cost (less handling costs) of 7.462 mills per kilowatt-hour.

T = The applicable New Jersey gross receipts tax, franchise tax, and surtax effective rate.

The "Fc", "Gc" and "Sc" factors are to be determined as the three month totals for the period ending with the second calendar month preceding the billing month.

The "T" factor is to be determined for the billing month.

Minimum bills shall not be reduced by reason of this fuel cost adjustment clause. This clause shall be applied to all kilowatt-hours supplied, and such charge shall be an addition to any minimums applicable.

Jersey Central Power & Light Company
FPC Electric Tariff
Original Volume No. 1

Third Revised Sheet No. 15
Superseding Second Revised
Sheet No. 15

## RESALE POWER SERVICE
## FUEL COST ADJUSTMENT CLAUSE

A fuel cost adjustment factor shall be applied to each kilowatthour supplied under this tariff. This fuel cost adjustment determined to the nearest one-thousandth of 1 mill per kilowatthour in accordance with the formula set forth below, shall be applied to all kilowatthours supplied during the billing month.

$$A = \left(\frac{Fc}{Sc} - \frac{Fb}{Sb}\right) \times L \times \frac{1}{1 - T}$$

Where A = Adjustment factor in mills per kilowatthour to be applied to each kilowatthour supplied under this tariff.

F = The cost of fossil and nuclear fuel, purchased power and net interchange determined as the sum of Accounts 501 and 547 (less handling costs), the cost of Account 518, the identifiable fuel costs of purchased power and the energy related costs of interchange purchased on an economic dispatch basis less the cost of fossil and nuclear fuel recovered through inter-system sales including the fuel costs rered through interchange sold on an economic dispatch basis.

S = Sales shall be all kWh's sold in the current (c) and base (b) periods.

Supreme Court, U. S.
FILED
JUL 2 1979
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

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**No. 78-1665**

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JERSEY CENTRAL POWER & LIGHT COMPANY, *Petitioner*

v.

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*

ALLEGHENY ELECTRIC COOPERATIVE, INC., *Intervenor*

BOROUGHS OF MADISON, BUTLER, LAVALLETTE AND SEASIDE HEIGHTS, NEW JERSEY, *Intervenors*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## BRIEF OF INTERVENOR ALLEGHENY ELECTRIC COOPERATIVE, INC. IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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## BRIEF OF INTERVENOR ALLEGHENY ELECTRIC COOPERATIVE, INC. IN OPPOSITION

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### OPINIONS BELOW

The initial opinion of the Court of Appeals is set forth as Appendix A attached to the Petition and its opinion denying rehearing is set forth as Appendix B to the Petition. The orders of the Federal Energy Regulatory Commission which were reviewed by the Court of Appeals are set forth as Appendices F and

G, respectively, to the Petition. Other orders of the Federal Energy Regulatory Commission and its predecessor, the Federal Power Commission, relating to this proceeding are set forth as Appendices C, D, E, and H of the Petition.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## QUESTION PRESENTED

Did the Federal Energy Regulatory Commission err in rejecting Petitioner's proposed "phase-in" of its fuel costs adjustment clause through summary disposition as constituting retroactive ratemaking, and as a violation of the filed rate doctrine?

## STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are adequately set forth in the Petition, and are attached thereto as Appendix J.

## STATEMENT

This proceeding was initiated before the Federal Power Commission[1] by Petitioner, Jersey Central

[1] On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DoE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), the Federal Power Commission ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary of the Department of Energy, and the Federal Energy Regulatory Commission which, as an independent commission within the Department of Energy, was activated on October 1, 1977. All references herein to the "Commission" shall be to the Federal Power Commission for the period prior to October 1, 1977 and to the Federal Energy Regulatory Commission for the period commencing October 1, 1977.



Power & Light Company, filing with the Commission on July 27, 1976, a proposed wholesale rate increase of $1,201,462 for service to its wholesale customers. On August 26, 1976, the Commission accepted the filing, suspended its operation for one month, and established procedures for determining the lawfulness and reasonableness of the proposed increase.

The Commission permits public utilities under its jurisdiction to include in rate tariffs filed with it a fuel cost adjustment clause providing that there be added to (or subtracted from) the base energy rate provided for in the tariff an amount reflecting the increase (or decrease) in the cost of fuel provided for in the base energy rate which has occurred subsequent to the fixing of the base energy rate. Because the fuel cost figures for the billing month are not available at the time of billing, usually the fuel adjustment clause will use the costs for an earlier month, or months, and apply such costs to the billing month kilowatt hours sold in the billing month.

Included in the Petitioner's filing was a base energy rate of 2.0 cents per kWh. The base energy rate was designed to recover fuel costs of 14.433 mills per kWh, which was the estimated base cost of fuel for calendar year, 1976, as shown on Statement O of the filing. The base cost of fuel in the previously existing rate was 5.659 mills per kWh which reflected the fuel cost level in 1972. Both the old fuel clause and the new fuel clause provide that the fuel adjustment factor is to be applied to kWh used by the customer *in the billing month*. In

both the new and previous fuel adjustment clauses, the fuel adjustment factor is calculated as the difference between the base cost of fuel and the cost of fuel in the current period, defined, by Petitioner, in both clauses as the average cost of fuel in the three month period ending with the second month preceding the billing month. Thus the filing had no effect on the total amount to be recovered in any month under the fuel clause, the combination of the base rate and the adjustment factor. Dollars were merely shifted from the adjustment factor to the base rate.

Thus, Petitioner continued to use the fuel costs actually incurred during the first three months of the prior four month period to impute the fuel costs included in the bills rendered for the billing period.

As shown above, in both the new and previous fuel adjustment clauses of Petitioner, the fuel adjustment factor is calculated as the difference between the base cost of fuel and the cost of fuel in the current period, defined as the average cost of fuel in the three month period ending with the second month preceding the billing month. Thus, the rate increase filing by the Petitioner had no effect on the total amount to be recovered for fuel in any month under the combination of the base rate and the adjustment factor. Dollars were merely shifted from the adjustment factor to the base rate.

However, Petitioner claimed, in its filing, that on the effective date of the proposed rates, it would have "incurred fuel costs above the base cost in the present clause which have not been recovered because of the billing lag." (R. 2, 459). Thus, Petitioner proposed to recover under the new tariff an amount which it



claimed was left unrecovered under the old rates due to the billing lag which was left unchanged in Petitioner's filing. Petitioner chose to attempt recovery of the claimed unrecovered fuel costs through the mechanism of a "phase-in" whereby customers would be billed, starting in the first billing month under the new tariff, for the raised, 1976 level base cost of fuel of 14.433 mills per kWh, but the adjustment factor would be calculated on the basis of the old 1972 level base cost of 5.659 mills per kWh. Gradually, over a period of five months, the base cost used in the adjustment factor would be raised to the 14.433 mills per kWh. In its Letter of Transmittal accompanying the filing, Petitioner claimed that its use of a phase-in to recover claimed unbilled fuel costs was based on the same theory as and differed only in form from fuel adjustment surcharges requested by other companies such as Public Service Company of New Hampshire ("PSNH").

In Opinion No. 790, *Public Service Company of New Hampshire,* 19 PUR 4th 210; rehearing denied Opinion No. 790-A, Docket No. ER76-285 (May 20, 1977), the Commission affirmed an Initial Decision by an Administrative Law Judge which rejected PSNH's attempt to collect through a new tariff fuel revenues which PSNH claimed were uncollected by its previously effective tariff. The Commission agreed with the Judge that any such attempt was unjust and unreasonable as constituting retroactive ratemaking. (Op. 790 at 3-4, 11-15).

By Order issued October 25, 1977 (set forth as Appendix F to the Petition), the Commission granted Motion for Summary Disposition of the fuel adjustment clause phase-in issue in this case.

In its order, the Commission held that there were no factual matters in dispute, and that, as Petitioner itself, had argued, the phase-in was identical to the proposed surcharge found illegal in Opinion No. 790. The Commission concluded:

> "Our determinations in Public Service Company of New Hampshire and in the subsequent surcharge cases were based on the filed rate doctrine and on the Federal Power Act proscription of retroactive rate making. The factors set out there are equally applicable to this proceeding, and we do not believe it is necessary for the hearing in this matter to consider Jersey Central's proposed phase-in." (Order Granting Motion For Summary Disposition, October 25, 1977, mimeo p. 14) (footnote omitted).

The Court of Appeals affirmed the Commission's grant of summary disposition. The opinion is attached as Appendix A to Petitioner's Brief.

## ARGUMENT

The Petition fails to establish grounds which would warrant review by this Court on *Certiorari*.

We should first point out that the Petition erroneously states the "Question Presented". The Petition refers to the tariff provision at issue here as "a just and reasonable electric utility tariff provision." The record is lacking any evidence tending to establish that the tariff provision in question is "just and reasonable".

The "Question Presented" also refers to the tariff provision as seeking "to recover for monies spent to purchase fuel consumed in generating electricity, where



the monies were spent before the tariff's effective date, but the fuel costs to be recovered are properly allocated as cost to the billing months occurring after the tariff's effective date."

As found by both the Court of Appeals and the Commission, and as is readily discernable from a reading of the tariff, such fuel costs are *not* properly allocated as costs to billing months occurring after the tariff's effective date.

### I. The Court of Appeals' Decision Is Clearly Correct

The Opinion of the Court of Appeals carefully analyzes the orders of the Commission being reviewed and impartially considers in detail the arguments advanced before it and to the Commission by Petitioner. It correctly concludes that the resolution of the issue before it depends solely upon an interpretation of the tariff provisions which became effective in 1973 and remained in effect until 1976. As the Court of Appeals and the Commission found, that tariff provided that in the billing month the wholesale customer would be billed for the kilowatt hours used during the billing month. The fuel adjustment factor to be applied to such sales would be based on the actual costs for fuel for a three month period ending two months prior to the billing month.

The Petition contends that the Court of Appeals ignored the Commission's own explanation of its decision and in support of that argument quotes the following comment by the Commission in one of its orders:

> " 'Our determinations in Public Service Company of New Hampshire and in the subsequent sur-

charge cases were based on the filed rate doctrine and on the Federal Power Act proscription of retroactive rate making. The factors set out there are equally applicable to this proceeding and we do not believe it is necessary for the hearing in this matter to consider Jersey Central's proposed phase-in. (footnote omitted).' "

[pp. 9-10].

The Petition then asserts:

"Instead of reviewing the decisional basis, the Third Circuit relied exclusively on its construction of the 1973 tariff. The consequent rejection of the Commission's rationale acts to substitute judicial judgment for a deficient administrative judgment. . . .

"The Court's construction, by itself, provides no legal basis for disapproving the phase-in provision of Jersey Central's tariff. Without such a basis, the Third Circuit's decision falls of its own weight."

[p. 10].

These are most certainly fallacious statements as the Court of Appeals most certainly reviewed the decisional basis and placed the identical construction on the 1973 tariff as had the Commission. The Court clearly indicated what the Commission had done and approved it after carefully analyzing the 1973 tariff. The Petitioner's phase-in provision constitutes retroactive rate making in the opinion of both the Commission and the Court of Appeals because of the rates set forth in the 1973 tariff.

The Petition argues that the Commission and the Court of Appeals unduly expands the rule against retroactive rate making. This is a baseless argument.



Both the Commission and the Court of Appeals merely apply the rule against retroactive rate making in its most simple form.

The Petitioner's proposed phase-in is patently retroactive rate making because it applies to a period of time prior to the effective date of the surcharge. Here we are unquestionably involved in a rate making procedure. Put the two facts together, the proposed phase-in would, if granted, clearly constitute retroactive rate making.

The Federal Power Act explicitly prohibits retroactive rate changes other than the refunds required by Section 205 of the Act. Under Sec. 205(d) a public utility may change its rates only after 60 days notice to the Commission. Moreover, under Sec. 206, the Commission can establish rates to be charged only after the date of the Commission Order establishing such rates. Over and over again, the courts have held that the Act forbids a public utility to recover past losses in future rates. It similarly forbids customers from retrieving excesses charged in the past. *Montana-Dakota Utilities* v. *Northwestern Public Service Company,* 341 U.S. 246, 254, 258 (1951); *Indiana & Michigan Electric Co.* v. *FPC,* 502 F.2d 336, 344 (1974); *Shell Oil Co.* v. *FPC,* 334 F.2d 1002, 1009 (1964); *FPC* v. *Hope Natural Gas Co.,* 320 U.S. 951, 618 (1944).

The United States Court of Appeals for the District of Columbia Circuit has held that such an attempt "runs afoul of the established ratemaking principle which precludes a utility from charging higher fares in the future in order to recoup past losses." *Payne* v. *Washington Metropolitan Area Transit Commission,*

415 F.2d 901, 910 (1968). It cites numerous cases in support of its holding.

This Court teaches:

> "But regulation does not insure that the business shall produce net revenues, nor does the Constitution require that the losses of the business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance is to be earned. . . . the deficiency may not be thus added to the rate base for the obvious reason that the hazard that the property will not earn a profit remains on the company in the case of a regulated, as well as an unregulated business." *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 590 (1942).

The Eighth Circuit in speaking of the Commission made this statement: "There is no place in the proceeding for either the Commission or the Court to accord reparation." *State Corporation Commission of Kansas* v. *FPC*, 215 F.2d 176, 184 (1954).

What is forbidden by the Act is precisely what Petitioner is attempting to do here—i.e., recover in future rates allegedly past operating expenses. Petitioner appears to assume that the Federal Power Act guarantees it recovery of all costs incurred before or after it makes its rate filing. It is seeking to make the Commission a guarantor of its profitability, all at the expense of its jurisdictional customers. The Supreme Court has made it clear that Petitioner's assumption is altogether in error. It has said that the regulated company "cannot recoup its losses by making retroactive the higher rate subsequently allowed. . . . The company's losses in the first instance do not justify its illegal gain in the latter." *FPC* v. *Tennessee Gas Transmission*, 371 U.S. 145, 152-153.



Thus, even if the rate designated by Petitioner actually had left it with a deferred expense, which it could not recover, it still could not recoup that expense by excessive charges in the future covering past costs. Under the Federal Power Act, the utility must bear the responsibility and the risks of establishing its own forward-looking rates.

As made clear from both the Commission and Court of Appeals analyses, Petitioner's fuel clause contained in the 1973 contract covered the rate to be paid by the customer in the billing month. Although, since the cost of fuel for the billing month was not available at the time the bills were mailed, actual fuel costs for earlier months were used as the billing costs. There was no provision in the tariff obligating the customer to make any payments to Petitioner after the billing month. When bills were received and paid, the customer owed nothing further to the Petitioner. Any attempt subsequently to bill for expenses incurred prior to such billing, patently must constitute retroactive rate making, in its simplest form. The inconsistency of the Petitioner's position is made explicitly clear by this observation by the Court of Appeals:

> "The tariff required that an adjustment factor be 'applied to all kilowatt-hours supplied during the billing month.' This is inconsistent with the company's premise that the charge was to be a pass-on of *actual* past costs incurred. If that were the aim, then the billing should have been computed on the basis of the kilowatt-hours used during the month in which the fuel charges were actually incurred. If, as Jersey Central argues, it was collecting ac-

tual fuel costs on a deferred basis, the company would have had to defer collections for several billing periods before recovering costs for the preceding months. Only in this way could the company avoid inconsistency with the provision that the fuel adjustment factor was to 'be applied to each kilowatt-hour supplied under this tariff' and 'to all kilowatt-hours supplied during the billing month.'

"Moreover, the premise underlying the fuel adjustment charge was that the customer should bear the added expense caused by the increased costs of fuel. A customer whose usage fluctuated substantially from month to month, however, would pay more or less than his proportionate share if the usage amount were not the same in the billing month as it had been in the month when the fuel expense was incurred. And, as was argued in the *New Hampshire* case, if the clause authorized the company to recover actual past costs on a deferred basis, then customers newly entering the system would be paying for fuel charges incurred before they received service and customers leaving the system would avoid paying for fuel used for their benefit." [App. A, Petition, pp. 6a-7a].

Further evidence of the correctness of the Court of Appeals' reasoning is this fact pointed out by the Court of Appeals in footnote 4 at p. 7a of Appendix A to the Petition:

"'[4] The company concedes that it did bill customers for the fuel service charged in December of 1973 at the time the rate became effective, but now contends that was a mistake and it should have waited several months before imposing the extra charge for the actual costs. The language of the tariff is completely consistent with the conduct of Jersey Central in 1973, and the present contention



of the company cannot vary the plain wording of the tariff.'"

It should also be noted that the fact that Petitioner filed a new tariff in 1976 did not mean that it was obtaining any less revenues for fuel than it had obtained under the old tariff. The fuel clause in the new tariff was identical with the fuel clause in the old tariff, except it increased the base rate from 5.659 mills to 14.433 mills, which represented the existing cost of fuel per kWh at the time the new tariff was put into effect. With this substantial increase in the base rate, the fuel adjustment factor, which is the difference between the actual cost of fuel for the current period and the base rate, would become much smaller. Thus, the total revenues recovered for fuel would be identical under both rates. Moreover, the lag period in the new fuel clause was identical with the lag period in the old clause. Thus, the Petitioner would recover the identical revenues for fuel under the new clause as the old clause and there would be no unrecoverable amounts resulting from the new clause to be "phased-in" as the Petitioner argues.

### II. There Is No Substantial Conflict of Decision

The Petition points out that the First Circuit in *Maine Public Service Co.* v. *FPC*, 570 F.2d 659 (1st Cir. 1978) vacated a Commission order which had declared unlawful a fuel clause adjustment surcharge provision. There, the Court ruled that the filed rate doctrine and the rule against retroactive rate making did not necessarily preclude the imposition of a fuel surcharge when the company involved was shortening the lag in its fuel adjustment clause. There are signi-

ficant differences between the situation as described by the First Circuit and the facts in this case. In the *Maine* case, Judge Campbell repeatedly emphasized that the problem was brought about by Maine Public Service Co.'s altering its fuel adjustment clause from a formula based on the previous 12 months, to one based on the one month prior to the billing month. Here the Petitioner has not altered its fuel adjustment clauses in any way other than merely to raise the base cost of fuel, and this alteration had no effect on revenues.

The basic reasoning in the *Maine* case is inapplicable here. The Court felt that the Commission, in the *Maine* case, had relied on the legal principles of the filed rate doctrine and retroactive ratemaking without examining properly the proposed surcharge to determine if it was in fact unjust and unreasonable. The Court indicated that it could be argued that the fuel clause contemplated that customers would have to pay the charge represented by the surcharge. The Court further stated that the surcharge could be likened to the continued operation of the old clause. Since these questions were unresolved, the Court felt that the mere application of the legal principles was premature. Thus, the Court ordered the Commission to re-examine the nature of the clause and then apply proper legal standards.

Although the First Circuit and Third Circuit are in disagreement to a limited extent, it would appear that with the remand to the Commission by the First Circuit, the results in both cases are most likely to be the same.



The Third Circuit is in complete agreement with the Fourth Circuit and the District of Columbia Circuit.

In *Virginia Electric & Power Co.* v. *Federal Energy Regulatory Commission,* 580 F.2d 710 (4th Cir. 1978), the Fourth Circuit took the position that the fuel adjustment clause did not provide for a recovery of past excess fuel costs but represented the orthodox use of test period to arrive at current costs. This is precisely what the Court of Appeals has done here.

In *Public Service Company of New Hampshire, et al.* v. *Federal Energy Regulatory Commission,* —— F.2d —— (Nos. 77-1592, 77-2004, 77-2005, 78-1329, 78-1330) (D.C. Cir., decided May 3, 1979), the Court was passing upon, among other fuel clauses, those of Pennsylvania Electric Company and Metropolitan Edison Company, which companies are affiliated companies of Petitioner. The fuel clauses of each of those companies was identical with the fuel clause of Petitioner. The Court affirmed the Commission's summarily rejecting the fuel surcharges proposed by the companies which surcharges were in substance the same as the Petitioner's "phase-in". In a lengthy opinion, the D.C. Circuit disposed of virtually each argument advanced by the Petitioner before the Commission, the Court of Appeals and here. The Court expressly held that the Commission correctly determined that the proposed surcharges of such sister companies of the Petitioner were "illegal retroactive rate increases."

It is respectfully suggested that, with the strong opinions in *Virginia Electric & Power Co.* and *New Hampshire, supra,* as well as by the Third Circuit in this case, compared to the qualified opinion of the First Circuit in *Maine,* there is reflected a situation

which does not constitute a substantial conflict of opinions meriting the granting of *Certiorari*.

### III. There Is No Question of Law

As emphasized by the Court of Appeals, what it was deciding here was the proper construction of a tariff (contract) filed with the Commission. The question of the proper interpretation of a contract most emphatically does not merit *Certiorari*. Both the legal issue as to the prohibition of retroactive rate making by the Commission and the necessity for the Commission to follow the filed rate doctrine, are beyond question. Petitioner does not raise any question as to the validity of these rules. The issue here has to do solely with the proper interpretation of the tariff.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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July 2, 1979

Supreme Court, U. S.
FILED
AUG 15 1979
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

**No. 78-1665**

JERSEY CENTRAL POWER & LIGHT COMPANY,
*Petitioner*

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*
*Respondents*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## PETITIONER'S REPLY MEMORANDUM

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IN THE

# Supreme Court of the United States

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v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*
*Respondents*

**On Petition for a Writ of Certiorari to the United States Court of Appeals For the Third Circuit**

## PETITIONER'S REPLY MEMORANDUM

In its Petition, Jersey Central Power & Light Company ("Jersey Central") sought to place before this Court a clear-cut legal issue, namely: whether, by reason of previous decisions of this Court, the Federal Energy Regulatory Commission ("FERC" or "Commission") lacks authority to approve an electric utility rate whenever part of the justification for the rate consists of cash expenditures made but not "accrued" as "expenses" during the period prior to the rate's effective date. Neither of the briefs in opposition address this issue. Instead both FERC

and Allegheny Electric Cooperative, Inc. ("Allegheny") contend that the result reached below is correct (FERC Brief in Opp., pp. 10-13; Allegheny Brief in Opp., pp. 7-13) and that the conflict among the United States Circuit Courts of Appeals with regard to the treatment of fuel adjustment clauses is too insignificant to warrant Supreme Court review (FERC Brief in Opp., pp. 13-14; Allegheny Brief in Opp., pp. 13-16).[1] Neither of these arguments undermines the considerations set forth in Jersey Central's petition.

Both respondents urge that the Commission and the United States Court of Appeals for the Third Circuit correctly construed Jersey Central's prior (1973) fuel adjustment clause. But Jersey Central's petition did not challenge that construction. Assuming, *arguendo*, that the Commission correctly construed the *1973 clause*, the question still remains as to whether that construction supports the conclusion that the Commission lacks authority, by reason of the general rule against retroactive ratemaking, to consider the justness and reasonableness of the phase-in component of the *1976 clause*.

The Commission held that it lacked such authority. The court below did not address the issue directly, stating only that "it appear[ed] . . . that the Commission [was] on solid ground in concluding that a reasonable interpretation of the [1973 fuel adjustment clause] compel[led] the result it reached." (Petition, p. 8a). The court rejected Jersey Central's request for a ruling on this issue. *Compare Jersey Central Power & Light Co. v. FERC*, No. 78-1185 (3d Cir., Feb. 2, 1979), *denying rehearing* 589 F.2d 142 (1978) (Petition, p. 10a), *with* Petition for Rehearing, *Jersey Central Power & Light Co. v. FERC, supra* (Petition, pp. 37a-42a).

[1] Although the Boroughs of Madison, Butler, Lavallette, and Seaside Heights, New Jersey, intervened below, they did not respond to the petition for certiorari.



Neither of the respondents provides a rationale for the conclusion that the appropriate effect of the construction of the 1973 fuel clause is the rejection of the phase-in component of Jersey Central's 1976 fuel adjustment clause. Much of their briefs is devoted to the reiteration of arguments suggesting the rate set may be unjust and unreasonable.[2] The Commission did not rule on these arguments. As a consequence, the only potential basis for the rejection of the phase-in provision is the general rule against retroactive ratemaking. While FERC asserts that the decision below necessarily rested on this rule (FERC Brief in Opp., p. 11) and Allegheny claims that the United States Court of Appeals for the Third Circuit "... merely appl[ied] the rule...in its most simple form...." (Allegheny Brief in Opp., p. 9), neither the third circuit nor the Commission articulated a basis for applying the rule to Jersey Central's 1976 tariff. In view of this, the result

[2] Allegheny theorizes that Jersey Central's characterization of the phase-in component of its 1976 fuel adjustment clause as just and reasonable lacks evidentiary support in the record. (Allegheny Brief in Opp., p. 6). However, since the Commission denied Jersey Central an opportunity to present evidence on this point at a hearing, Order Granting Motion for Summary Disposition in Jersey Central Power & Light Co., Docket No. ER 76-813 (Oct. 25, 1977) (Petition, p. 25a), the rate set under that clause must be assumed to be just and reasonable at this juncture. *Cf. Jersey Central Power & Light Co. v. FERC*, 589 F.2d at 146.

Similarly, Allegheny states incorrectly that the Commission rejected as unjust and unreasonable the fuel adjustment surcharge provision considered in Opinion No. 790, Public Service Co. of New Hampshire, 19 P.U.R. 4th 210 (FPC 1977), *rehearing denied*, Opinion No. 790-A, Docket No. ER76-285 (May 20, 1977), *aff'd* No. 77-1592 (D.C. Cir., filed May 3, 1979), *petition for cert. filed by Public Service Co. of New Hampshire* (Aug. 1, 1979) (No. 79-169). (Allegheny Brief in Opp., p. 5). *See* Opinion No. 790, *supra* at 217-20.

below cannot be assumed correct.[3] *See Borough of Ellwood City v. FERC*, 583 F.2d 642, 649 (3d Cir. 1978) (application of filed rate doctrine proper only when purposes of Federal Power Act furthered); *accord, Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 147 (1960).

The Commission recognizes that there is not only a conflict between the circuits with respect to the issue here involved (FERC Brief in Opp., p. 12), but also that two state supreme courts have reached conflicting results on the same issue (FERC Brief in Opp., p. 14 at n.14).

The respondents' suggestion that this case nevertheless lacks the level of significance necessary to justify consideration by this Court cannot bear scrutiny. First, despite FERC's assertion to the contrary (FERC Brief in Opp., p. 13-14), the electric utilities' increased sophistication regarding fuel adjustment clause design does not remove the obstacle mistakenly erected by the Commission which prevents full recovery of fuel costs by utilities, such as Jersey Central, whose clauses still contain lag provisions.[4] More significantly, the effect of the decision below cannot, as the Commission implies (FERC Brief in Opp., p. 13-14), be confined to the narrow context of cases involving transitions between different fuel adjustment clauses. Respondents suggest no logical means for confining the Commission's interpretation of the rule against

[3] Allegheny's assertion that both the third circuit and the Commission found that the expenditures at issue were not properly allocated to the period occurring after the 1976 tariff's effective date (Allegheny Brief in Opp., p. 7) is misleading. The decisions below found that those costs were incurred during the efficacy of the 1973 tariff. Jersey Central agrees, but that finding encompasses only the timing of the cash outlays and not the timing of the recognition of those outlays as "expenses" on its books.

[4] While the record contains no information regarding the extent to which lag provisions persist throughout the industry, Allegheny states that lag provisions are common. (Allegheny Brief in Opp., p. 3).



retroactive ratemaking to the fuel adjustment clause context. (Allegheny Brief in Opp., p. 11). Since cash expenditures made in one period but recognized for ratemaking purposes as costs incurred in another period are common in the utility industry, the petition raises significant issues justifying the grant of certiorari.

The recent decision of the United States Court of Appeals for the District of Columbia Circuit in *Public Service of New Hampshire v. FERC*, No. 77-1592 (D.C. Cir., filed May 3, 1979), *rehearing denied* (July 3, 1979), *petition for cert. filed by Public Service Co. of New Hampshire* (Aug. 1, 1979) (No. 79-169), does not resolve those issues. Neither the D.C. Circuit's opinion nor its order denying rehearing dealt with the questions raised in Jersey Central's petition, even though they were before the court.[5] As a result, that case does not obviate the need for Supreme Court review.

Respectfully submitted,

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[5] Two of the parties before the D.C. Circuit, Pennsylvania Electric Company and Metropolitan Edison Company took a position virtually identical to that urged by Jersey Central. *See* Petition of Pennsylvania Electric and Metropolitan Edison Co. for Rehearing, *Public Service of New Hampshire v. FERC, supra* (D.C. Cir., filed May 17, 1979) (App. A, pp. 2a-8a, *infra*).

# APPENDICES

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 78-1329 September Term, 1978

PENNSYLVANIA ELECTRIC COMPANY,
*Petitioner*

v.

FEDERAL ENERGY REGULATORY COMMISSION,
*Respondent*

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ALLEGHENY ELECTRIC COOPERATIVE, INC.,
*Intervenor*

And Consolidated Case No. 78-1330

BEFORE: Tamm and MacKinnon, Circuit Judges; and Pratt*, District Judge, United States District for the District of Columbia

## ORDER

Upon consideration of petitioners' (Pennsylvania Electric Company and Metropolitan Edison Company) petition for rehearing, it is

ORDERED, by the Court, that petitioners' aforesaid petition for rehearing is denied.

*Per Curiam*

FOR THE COURT:

GEORGE A. FISHER
Clerk

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* Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PENNSYLVANIA ELECTRIC COMPANY
*Petitioner,*

METROPOLITAN EDISON COMPANY
*Petitioner,*

v.

FEDERAL ENERGY REGULATORY COMMISSION
*Respondent,*

Docket Nos.
78-1329
78-1330

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## PETITION OF PENNSYLVANIA ELECTRIC COMPANY AND METROPOLITAN EDISON COMPANY FOR REHEARING

### I. INTRODUCTION

Pennsylvania Electric Company and Metropolitan Edison Company (Petitioners) hereby apply for rehearing of this Court's judgment in the above captioned proceeding entered on May 3, 1979. In its opinion, this Court agreed with the Federal Energy Regulatory Commission's interpretation of the nature of Petitioners' superceded fuel clauses. Petitioners accept that conclusion *arguendo*. Petitioners dispute, however, that this interpretation of



their tariffs necessarily compels the conclusion that the proposed surcharges constitute proscribed retroactive ratemaking.

### II. ARGUMENT

These Petitioners did not rely primarily on the argument that their superceded fuel clauses were "cost of service" in nature and hence merely deferred billing. Rather Petitioners' primary contention (see Argument A to Petitioners initial brief) was that, regardless of the nature of their prior fuel clauses:

> "[t]he surcharges are simply not an attempt to recover 'costs' which were incurred during the effective period of the old fuel clauses and which the old fuel clauses should have recovered. Rather, the surcharges seek to recover fuel costs properly allocable to the current period. As such, they do not violate the rule against retroactive ratemaking." (Petitioners reply brief, p. 7).

The Court's opinion simply fails to treat Petitioners' main argument.

Petitioners will not belabor their argument here. In essence, the argument is that in many instances the recognition of "expenses" for both accounting and ratemaking purposes does not coincide with the time of the cash expenditures related to those "expenses."

In view of the Court's analysis, we believe that a detailed example may serve to illustrate our argument. Suppose, for example, that Utility A normally incurs maintenance expenses of approximately $1,000 per year. Utility A's filed rate is based upon recovery of approximately $1,000 for maintenance expenses.[1] In the Court's

[1] Recovery of such expenses, of course, is on a per unit of sales basis.

terms, Utility A's rate is a "fixed rate" tariff which does not guarantee that there will be dollar-for-dollar recovery. Let us suppose further that during 1977 there is an unusual occurrence (e.g., a hurricane) and Utility A experiences an extraordinary maintenance expense level of approximately $10,000 in 1977.

Under proper accounting methods, Utility A is required to amortize this extraordinary maintenance expense over the next ten years. Hence, in 1978, Utility A reflects on its books a maintenance expense of $1,000 and an additional "amortization expense" of $1,000. Utility A is entitled to seek by any rate increase it files for over the next several years to recover under its rates both its annual $1,000 in normal maintenance expense and its annual $1,000 in "amortization expense." And this is so even though this "amortization expense" represents dollars actually spent in 1977. It has never been argued that Utility A's rates set in 1978 or 1979 or later would constitute retroactive ratemaking merely because they would include an element which recovers for an amortization expense properly reflected on its books and allocable to the current period.

Expenses which represent the amortization of prior cash outlays are quite common (e.g. depreciation expense, extraordinary property losses, deferred maintenance, etc.). The essence of the concept is that "expenses" arise and are recorded on books of account, not at the time of cash outlay, but at some other time—the time of recognition to be based on sound accounting principles. It is a basic principle of accounting to effect, as nearly as possible, a matching of revenues and associated expenses. This principle supports the deferred fuel expense accounting which Petitioners have utilized since the inception of their prior fuel clause.



Accrual accounting concepts are particularly applicable to fuel expense accounting. Even absent deferred fuel expense accounting, the amount of fuel "expense" for any given month is nothing more than a book accounting entry. This book entry has no direct relationship to the amount of cash which a company spends in a given month to purchase fuel. Cash is spent to purchase fuel which goes into inventory. Both the dollars spent and the amount of fuel purchased in a given month may differ significantly from the amounts and the dollars of fuel consumed in a given month. Nuclear fuel expense accounting presents a good example of the process. The cash outlay for nuclear fuel rods may occur several months or even years in advance of the accrual on the books of each monthly nuclear "fuel expense." The Commission's regulations even require that when an estimate of useful life of fuel rods changes, the monthly "nuclear fuel expense" amount accrued on the books must also change to reflect the revised estimate (See 18 C.F.R. Part 101, Uniform System of Accounts, Account 518). When a company records on its books a nuclear fuel expense of $1,000 for a given month, a process by which it "amortizes" a portion of a *prior* cash outlay, it cannot constitute retroactive ratemaking for the company to seek to recover under its current fuel cost adjustment clause, $1,000 in nuclear fuel "expense."

In short, companies are entitled to design rates to recover all "expenses" which, under appropriate accounting principles, are properly recognized as accruing during the current period of the rate in question. This Court defines retroactive ratemaking as a "... rate designed to recoup past losses." (Slip Op. at 28). We agree. But "losses" do not and cannot arise until they are recognized by the accounting process. The dollars these Petitioners seek to recover were not, and never had been recognized as "losses" or "expenses" in any period prior to the effective period of the rate in question.

Although the Court does not deal with the accounting examples or the argument offered by Petitioners, it comes close to treating the subject when it attempts to distinguish PGA and RD&D clauses:

> "The difference between PGA and RD&D clauses on the one hand, and the proposed surcharges on the other, is that the former prospectively provided for after the fact maturing, whereas imposition of the latter (the surcharge) would be a retroactive shift from a 'fixed rate' to a 'cost of service' tariff." (Slip Op. at 34, n. 67).

As already noted, Petitioners argument does not depend upon the nature of the prior tariff (i.e., whether it is "fixed rate" or "cost of service"). The PGA regulations provide for the establishment of a separate account to track the results actually produced by the clause and for subsequent adjustments based on these actually recovered amounts (18 C.F.R. §154.38). Therefore, Petitioners will accept *arguendo* the Court's distinction of PGA clauses.

The Court's conclusion with respect to the nature of RD&D clauses, however, is in error. In the first place, a close reading of the Commission's regulations reveals that the clauses themselves are not, in the Court's terms, cost of service clauses. The mechanics of the clause required by the RD&D regulations precludes *precise* (i.e., "cost of service") after the fact matching.[2] More importantly,

[2] Several features require this conclusion: 1) a change cannot be effected unless there is a specified minimal impact ($.0001 per KWH); 2) the unit rate change must be designed upon sales for the 12-month period ending 3 months before the proposed effective date and applied to future sales, *with no requirement of an accounting for amounts actually recovered thereby, or any recognition of amounts actually recovered in the design of the next clause;* and finally 3) the clause cannot be used to effect a rate reduction below the level of RD&D expenditures existing before the institution of an RD&D clause (See 18 C.F.R. §35.22).



however, the regulations specifically address the subject of how the *initial* RD&D clause is to be effected. *No prospective filing is called for.* The utility is clearly entitled to file its first RD&D clause and recover its RD&D expenditures for the 12-month period ending 3 months *before* the proposed effective date. The only requirement is that the clause be filed 60 days prior to its proposed effective date (18 C.F.R. §35.22). Hence, at least with respect to the initial RD&D clause, there is absolutely no prospective provision for the after the fact revenue recovery which takes place under that first RD&D clause. In short, RD&D clauses simply cannot be distinguished from the situation presented here. If one were to substitute "fuel cost expenses" for RD&D expenses, the impact of the Commission's present RD&D regulations would be to authorize precisely that which Petitioners are requesting here.

In sum, the retroactive ratemaking concept is, as the Court described, applicable to an attempt to recoup past "losses" by a retroactive rate increase. Past "losses" do not and cannot exist until they are recognized by application of proper accounting principles. The retroactive ratemaking concept simply does not bar recovery of proper amortization expenses, depreciation expenses, deferred maintenance expenses, fuel expenses, or any other expenses which, under proper accounting principles, are recognized as accruing during the effective period of the rate in question. The Commission has extended the retroactive ratemaking concept to an area it was never meant to cover. In doing so, it abrogates its responsibility under the Federal Power and Natural Gas Acts to determine the justness and reasonableness of Petitioners' filed rates. The Commission should be required, on remand, to address the question of whether the surcharges are just and reasonable.

## III. CONCLUSION

*Wherefore* the instant petition for rehearing should be granted and the proceeding should be remanded to the Federal Energy Regulatory Commission for a determination of the justness and reasonableness of Petitioners' proposed surcharges.

Respectfully submitted,

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May 17, 1979